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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 807

MISSISSIPPI VALLEY BARGE LINE COMPANY, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

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[fol. 8]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

No 10496

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Defendants

AMENDED PETITION—Filed Aug. 15, 1933

To the Honorable the Judges of said District Court:

Your petitioner by leave of court presents and files this amended petition, and your petitioner, the Mississippi Valley Barge Line Company, hereinafter called "Barge Company", brings this action against the United States of America and the Interstate Commerce Commission, hereinafter called "Commission" for the purpose of enjoining, setting aside, annulling and suspending a certain order of the Commission relating to transportation, made and entered on the 3rd day of July, 1933, and by amended order entered on the 18th day of July, 1933, in proceedings as follows:

By Supplement No. 54 to Agent Emerson's Tariff No. 1-H, I. C. C. No. 156, and Sup. 48, 10-B, I. C. C. 165, become effective October 1, 1932, the carriers party thereto proposed reduction in the rates on sugar in carload from gulf ports, to-wit, Mobile, Alabama, New Orleans, Louisiana, Pensacola, Florida, and Port Chalmette, Louisiana, to certain destinations in Illinois, Indiana, Iowa, Kentucky, Missouri, Ohio, Tennessee and Wisconsin. The participating carriers in said tariffs are set forth in Exhibit A hereto attached, and one, or more of said corporations is organized

under the laws of the State of Missouri and has its principal office in this judicial district. Thereafter various par- [fol. 9] ties and your petitioner on, to-wit, September 8, 1932, applied by petition to the Interstate Commerce Commission and protested said rates and requested suspension; that thereafter the Commission upon said petition suspended said rates and entered its order of investigation and suspension, its Docket No. 3814, designated "Sugar Rates from Gulf Ports", and said Commission thereafter entered upon an investigation and on July 3, 1933, rendered a decision which was released from the office of the Commission, and received by petitioner on July 17, 1933, and final orders of the Commission in connection with said decision were entered as of July 3, 1933, as amended July 18, 1933. The decision of the Commission is hereto attached and marked Exhibit B and contains order of July 3rd, 1933. The final order of the Commission is hereto attached, marked Exhibit C, and by reference said Exhibits A, B and C are made a part of this petition.

1. For its cause of action petitioner states that Barge Company is, and at all times hereinafter mentioned was, a corporation duly organized and existing under and by virtue of law, owning, maintaining and operating a line of towboats and barges on the Mississippi and Ohio Rivers serving ports New Orleans, Louisiana, Cincinnati, Ohio, St. Louis, Missouri, and ports intermediate thereto in the transportation by Barge Company of freight as a common carrier in interstate and foreign commerce—the principal operating office of Barge Company is now and it was at all such times situated in the City of St. Louis in the Eastern Division of said Eastern Judicial District of Missouri.

Your petitioner states that its venture was undertaken by reason of the assurance that water transportation would be preserved in full vigor under the mandate of Federal enactments.

2. The United States of America is made defendant in this suit pursuant to District Court Jurisdictional Act. Sections 45-a and 46, 38 Statute 219 and 36 Statute 1149, [fol. 10] respectively, (Title 28, Chapter 2, Section 45-a, and Section 46, U. S . C. A.).

3. The Commission is an administrative tribunal created by the Act to Regulate Commerce (24 Statute at Large

379) approved February 4, 1887, as amended (The Interstate Commerce Act) and is specifically charged with the administration and enforcement of said Act, including the various provisions thereof, including the Transportation Act of 1920 and Section 500 thereof.

4. In said proceeding, I. & S. 3814 and associated cases and on, to-wit, July 3, 1933, and on July 18, 1933, said Commission made and entered an order and an amended order on said dates, and in said order the Commission referred to and made a part thereof a "Report" of the Commission "containing its findings of facts and conclusions thereon." In and by said report the Commission found that the purpose of the rail lines in the proposing of the rates contained in the tariff aforesaid was a drastic and sweeping reduction in rates for the evident intention and purpose of meeting a competitive rate by barge-truck competition and that said rail carriers would consider even lower rates than those proposed if said rates "do not prove sufficiently effective" for the purpose of regaining sugar traffic from the water lines and in said decision said Commission in exact terms admitted that the rates proposed, and by the Commission found justified, would result in a staggering blow to the water barge lines, and further specifically stated (Sheet 17) that accordingly the usual water-truck rates to interior points north and south of the Ohio River are probably from 5 to 15 cents higher than the proposed all rail rates of 28 and 30 cents—the proposed rates as applied to the interior points alone would prob-
[fol. 11] ably bring respondents (rail carriers) a heavy traffic, would stop a large part of the distribution of waterborne sugar, and dry up much of the water movement. (Sheet 19) "If the differential is substantially reduced the standard barge lines will get less sugar and lower rates on such of it as they do handle. Barge rates made on the 80% basis if applied to the tonnage moved by the Federal Barge Line in 1931 would have cost that carrier about $350,000.00 and wiped out its showing of net revenue. If applied to the reduced volume that it would probably have received under a differential of about 5 cents, they would have cost it much more. * * * If respondents succeed, the barge lines will be dealt a staggering blow."

5. Your petitioner respectfully states to the Court that the above statements and findings of the Commission sub-

stantially carried into effect the proposal of the railroad. The Commission recognized that the proposed rates of the rail carriers as contained in the tariffs above mentioned, which are here allowed to become effective with slight modification under said decision and order of the Commission, will result in taking from the water carrier its entire sugar tonnage which your petitioner states in years past constituted 33⅓% of its total tonnage moving over and along its lines, and approximately 40% of its total revenue. The Commission in said decision recognized the facts and found that the rates proposed by the rail carrier and justified by the decision of the Commission will be a staggering blow to water carriers, including this petitioner, and that said rates will result in the elimination of the entire net revenue of the Federal Barge Line, a federal agency which operated under and by virtue of a mandate of Congress for the purpose of demonstrating the feasibility of water transporta-
[fol. 12] tion, and your petitioner states that said Federal Barge Line as a federal agency operates under circumstances and conditions and at a less total cost of operation than your petitioner, a private enterprise, and that, therefore, the finding with reference to the situation of the Federal Barge Line, with reference to its inability to continue in water transportation as a profitable venture, applies in an exaggerated form as against your petitioner.

6. And further that said Commission in said particular finding specifically states that the rates proposed by the carriers and found by the Commission to be justified with slight modification to interior points north and south of the Ohio River on sugar, and in the movement of which your petitioner is vitally interested, are probably from 5 to 15 cents higher than the proposed all-rail rates, which in plain language means that the rates proposed by the carriers for all rail service by rail lines are from 5 to 15 cents lower than the total cost of the barge-truck movement. The Commission in said decision justified the proposed rates of the rail carriers for carload application on a minimum weight of 60,000 pounds and modified the proposed rates of the rail carriers for carload application on minimum weights of 80,000 pounds by increasing the proposed rates 4 cents per 100 pounds.

7. The findings of the Commission have dwelt entirely on the 80,000 pound rates, and their having found justified the

80,000 pound minimum rates less than the 60,000 pound minimum rates constitutes the sole justification for their findings with respect to the 60,000 minimum rates. Your petitioner states the fact to be, and the decision of the Commission recognizes the fact that by far the major portion of the sugar tonnage will move on the 80,000 pound minimum, and the Commission in its said decision justifies a rail rate 4 cents over the rates proposed by the rail carriers, and, therefore, approves of a rate for all-rail service from [fol. 13] 1 to 11 cents lower than the total cost to the refiner of a barge-truck movement, to-wit, a movement by barge from gulf port to a Mississippi or Ohio River port plus the cost of a truck delivery from said river port to the interior destination.

8. Your petitioner further states that under the Interstate Commerce Act and the Denison Act it is recognized that for the barge-rail movement of tonnage it is necessary that a differential be prescribed under the all-rail rate in order to attract tonnage to the barge line as a participating carrier and that the Commission in prior decisions, to-wit, Ex. Parte 96, 99 and 102, has by definite and positive order prescribed differentials under the all-rail rate of amounts in cents per 100 pounds to be determined by taking 20% of the all-rail rate applicable between the two ports served by the barge line in a given joint movement, and, therefore, to the extent that the Commission in its decision has found justified rail rates lower than barge-truck cost to interior points, it has not given effect or consideration to the full damage and detriment that would accrue to the barge line movement on this or any other tonnage, and to that extent has not indicated the full detriment and the damage that will accrue to the barge line by the rail rates here found justified.

As further evidence of the intent and purpose of rail carriers designated in Exhibit A, your petitioner states that since they entered upon the policy to eliminate water transportation the Southern carriers have reduced rates on Bagging, Canned Goods, Coffee, Corn, Cotton, Glassware, Paper pulp, Rice, Soap, Sugar, Sulphur and Tobacco, to-wit, on every commodity handled by your petitioner in excess of one thousand tons a year.

[fol. 14] 9. Your petitioner further states that by virtue of 41 Statute 499, Section 500, approved February 28, 1920

(U. S. C. A. Title 49, Section 142), it is declared by Congressional mandate as follows:

"It is declared to be the policy of Congress to promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States and to foster and preserve in full vigor both rail and water transportation."

And your petitioner, therefore, states that the Commission in its decision has entirely failed and refused to give effect to this mandate of Congress, a positive and direct statement as to the Commission's duties and responsibilities, and your petitioner further states that in the particulars above set forth the decision of the Commission for all practical purposes admits and recognizes that the effect of the rates justified and therein specifically set forth will deny to water transportation its continuation as a profitable operation, and contravenes the mandate that water transportation be fostered and preserved in full vigor.

10. Your petitioner further represents and states that said decision and order of said Commission is without evidence to support same and beyond the record in said proceeding since the Commission therein, in considering the level of the proposed rates, has taken the testimony of neither the respondents nor protestants, and although the Commission in its decision does not indicate the particular manner in which it arrives at a formula to justify the level of the rates approved or designated, the only way in which said conclusion could have been reached is by taking a mathematical average of the costs testified to by respondents' and protestants' witnesses, averaging the two, and adding a differential testified to by one sugar refiner who [fol. 15] indicates the particular differential upon which he would move sugar by barge line. The Commission thus erroneously and unlawfully arrived at a total cost of the barge service. The Commission in determining the level of the rail rates, considered the cost of competitive transportation; since the Commission erred as indicated above, in its computation of barge service cost, the result reached by it as to the rail rate level is necessarily erroneous and unlawful. There is no testimony in the record to justify the Commission's finding.

Further, your petitioner represents and states that the Commission in the instant proceeding in giving consideration to the level of the rail rates (which it justifies and designates) in order to determine whether or not said rates are compensatory for the service performed by the rail lines, has alone taken into consideration the fact that the 80,000 pound minimum rates found justified will for the service over the short line from New Orleans to Chicago produce net ton per mile earnings of 6½ mills as contrasted with the system cost of the Illinois Central of 6 mills per ton per mile, and that the Commission in making this comparison has given consideration to the system costs of one of the rail lines only, whose costs are extremely low by reason of the fact that 50% of its tonnage consists of products of mines, which is the cheapest of all kinds of freight to transport; that it bases the earnings out of the rates found justified on the short line distance and gives no consideration to the other much longer available routes by which this rate will apply, and by this erroneous calculation finds compensatory the rates justified and designated.

[fol. 16] 11. Your petitioner alleges and states that the rail carriers presenting the tariffs heretofore mentioned proposed a 28 cent rate from New Orleans to St. Louis alone for the alleged and indicated purpose of meeting a competitive situation incident to water transportation. Your petitioner further states that at the time of the filing of said tariffs, and at the present time, the going rate incident to port to port movement from New Orleans to St. Louis by certificated barge line was from 37¢ to 42¢ per hundred pounds, and that said lines then and now move a large proportion of the north bound barge sugar; and your petitioner further states that the going rate at the time the tariffs above mentioned were presented of the all-rail movement from New Orleans to St. Louis was 52¢ per hundred pounds. Your petitioner further states that the Commission in connection with the 28¢ rate proposed by the rail carriers on 80,000 pounds minimum approved and designated a rate four cents higher as justified for all-rail-movements from New Orleans to St. Louis, which produces a rate justified by the decision and order of the Commission of 32¢ for all-rail movement from New Orleans to St. Louis; that this particular approved and designated rate for all-rail application is, therefore, below the present certificated

barge line rate. And your petitioner further alleges and states that the evident intent and purpose of said rail carriers, in so far as certificated barge line competition is concerned, by virtue of the level of the rates proposed, indicated more than the meeting of a competitive rate by this competitive transportation facility, and was intended to cripple or eliminate certificated barge lines operating over and along the Mississippi and Ohio Rivers and their tributaries.

Your petitioner further states that at the time of this hearing there was no through barge route from New Orleans to Chicago, and that, therefore, the rate to St. Louis [fol. 17] is typical of the character of the rates proposed by the rail carriers, and the particular intent and purpose that the rail carriers had in mind in proposing said rates. Your petitioner further states that the Commission in the approval and designation of a rate of 32 cents for all-rail movement from New Orleans to St. Louis to meet a competitive certificated barge line rate of 37 cents to 42 cents permitted and allowed the rail carriers to carry out and put into execution and effect their purpose, to-wit, the elimination of certificated barge line movements.

Your petitioner further represents and states that the contract barge operators at the time of the hearing before the Interstate Commerce Commission moved substantially less volume of sugar than other carriers, and that in so far as the Interstate Commerce Commission has given consideration to the so-called contract barge movements from New Orleans to ports upon the Mississippi and Ohio Rivers in an attempt to determine a level for the all-rail movements, that the contract barge line operators and operations have disappeared from the picture since the hearing before the Commission, with the exception of one particular line, which since the hearing before the Commission has increased its rate for tow service from New Orleans to St. Louis to 25 cents, and that all other contract barge operators and operations over and along the Mississippi and Ohio Rivers or their tributaries have disappeared from the picture at the present time, and therefore, the proposed [fol. 18] rates approved or the rates designated by the Commission as justified at the time said rates will become effective will be to meet alone the competitive situation as presented by the certificated barge lines, including your

petitioner, and that the prescription and publication of a 32 cent rate for all-rail movements from New Orleans to St. Louis as designated and justified by the Commission to meet a competitive situation of the certificated barge lines of 37 to 42 cents from New Orleans to St. Louis produces a situation where the all-rail lines are permitted to charge less per hundred pounds than the rate of the certificated barge lines, and that the effect of such rates being justified and if permitted to become effective can have but one result, and that is the elimination of the entire sugar tonnage from the water-borne service. The Commission has and now recognizes the fact that for the inferior service of the water line a differential under the all-rail rate is necessary to move tonnage by barge. This aggravates the situation above indicated and the Commission by its order is permitting and allowing a positive effort on the part of the rail lines to eliminate water competition.

12. Your petitioner further represents and states that by virtue of 26 Statute 209 (U. S. C. A., Title 15, Section 1) every contract, combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations, is declared to be illegal. Section 2 of said enactment further makes it unlawful for any person or persons to monopolize any part of the trade or commerce among the several states or with a foreign nation, and provides a penalty for same.

[fol. 19] 13. Your petitioner further states that the rail carriers designated in Exhibit A hereto attached have by joint or concurrent action proposed particular tariffs applicable to rates by rail lines on sugar from various origins and to designated destination, and it is alleged that the purpose and intent of said rail carriers is in effect to restrain commerce between the various states, or tend thereto, and that the Commission in said decision recognizes the fact that these tariffs will have the effect to restrain commerce between the various states, or tend thereto. Your petitioner further represents and states that in the oral argument, I. & S. 3814 and associated cases, attorney for one of these carriers, and evidently concurred in by the other rail carriers, frankly and definitely expressed to the Commission that it was the intent and purpose of the pro-

posed rates to cripple or entirely eliminate water transportation; and your petitioner further represents that of necessity this is the result of the confederated and concurrent action by the rail carriers in the instant proceeding, and that the Commission has failed and refused to give effect to this mandate of Congress and hereby permits of concurrent action by various rail carriers which results by reason of a contract, combination or agreement and will restrain the trade and commerce among the several states and will tend to produce a monopoly in reference thereto. Wherefore, your petitioner states that said decision of said Commission is in direct conflict with statutory enactment, and that, therefore said decision and order are contrary to law, illegal and void.

Your petitioner further represents and states that by virtue of a lawful enactment of Congress, 45 Statute 978, [fol. 20] as amended May 29, 1928 (U. S. C. A. Title 49, Section 152, et seq.) Congress provided for a corporation, and appropriated designated amount for the purpose of demonstrating the feasibility of water transportation and provided that it was the policy of Congress to continue said transportation service of the corporation until there were completed navigable channels adequate for reasonable, dependable and regular transportation service thereon, terminal facilities adequate for the joint rail and water service, joint rail and water rates, and private persons, companies, or corporations engaged or ready and willing to engage in common carrier service on such river, and that said project should be continued upon the Mississippi River and its tributaries until the feasibility of said venture should be determined, and said corporation should not be sold to any carrier by rail or person or company directly or indirectly connected with any carrier by rail or any person, company, or corporation who should not give satisfactory assurance and agree as a part of the consideration for said sale that the privilege so sold at least should be continued in the common carrier service in a manner substantially similar to that rendered under federal supervision by said corporation, and further provided that any person, firm or corporation, including the Inland Waterway Corporation, engaged or about to engage in conducting a common carrier service upon the Mississippi River or its tributaries, could apply to the Interstate Commerce Commission and obtain

a certificate of public convenience and necessity in accordance with the provisions of said enactment.

Your petitioner further states that in accordance with the provisions of said enactment it, as a corporation engaged or about to engage in common carrier service on the Mississipi River and its tributaries, did obtain a certificate of [fol. 21] public convenience and necessity in Ex Parte 99 (167 I. C. C. 41) and that by said decision and order of the Commission, said Interstate Commerce Commission directly found that your petitioner was an operation in public interest and of public convenience, and your petitioner further represents and states that by virtue of the order of this Commission in I. & S. 3814, that the effect upon your petitioner is to remove, or tend to remove, various movements of sugar from your petitioner's line and to render said venture unprofitable and that the effect of the order of the Commission in I. & S. 3814 and associated cases is to remove said transportation facility as a water carrier from the Mississippi River and its tributaries and to withdraw and annul for all practical purposes its certificates above referred to without said certificate being directly brought in issue or being at issue in the instant proceeding.

Your petitioner further represents and states that under the decision of the Commission in the instant case, I. & S. 3814 and associated cases, the Commission admits that it is improbable that the rail carriers by the rates proposed or designated can or will recapture sugar tonnage in sufficient amount to compensate them for the losses which they will sustain under the present movement and under the present rate, that the Interstate Commerce Act (U.S.C.A. Title 49) Section 15-a, places a positive duty upon this Commission to maintain the operation of rail lines as efficient and effective system of transportation, and as "will under honest, efficient, economical management and reasonable expenditures—earn an annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railroad property * * * used in the service of transportation"; that the rail lines here involved at the present time are in dire need and in financial distress, [fol. 22] that the rates here justified or designated will necessarily result in a substantial depreciation of carrier's revenue, and that, therefore, the instant decision is contrary to and in violation of expressed mandate of Congress

with reference to matters within the jurisdiction of the Interstate Commerce Commission.

14. Your petitioner states that the Commission in connection with I. & S. 3814 heard upon a common record I. & S. 3829 and Fourth Section Application 14080, and that I. & S. 3829 involves rates on the same commodity proposed by Eastern carriers to the same destination territory, and that Fourth Section Application 14080 had to do with proposed rates by Western carriers from the Pacific Coast to the same or related destination territory, and your petitioner states that the Commission in giving consideration to said dockets, and upon the movement of the same commodity from the Gulf ports, from the Atlantic seaboard and from the Pacific Coast, decided and determined and issued effective orders in connection therewith as follows:

First: That the Eastern rail carriers on the movement of sugar from the Atlantic seaboard to Chicago and related destinations were justified in charging 27½% of the applicable first class rate on the movement of said commodity and from said origins and to said destinations. In I. & S. 3814 the Commission decided and determined that in the movement of sugar from New Orleans to St. Louis, Chicago and intermediate territory, that the Southern lines were justified in the prescription of rates in definite cents per 100 pounds, and that said carriers were justified in permitting and allowing said rates to intermediate territory to blanket back to a point where the level of the rates would not violate the Fourth Section of the Interstate Commerce Act, and that the Commission in Fourth Section Application 14080 from the Pacific Coast on Trans-Conti-
[fol. 23] nental Lines permitted these lines to maintain and apply rates to the designated territory east of the Mississippi River on a lower level than the points west of the Mississippi River and intermediate thereto and granted these carriers Fourth Section relief in order that said rate would not violate the Fourth Section of the Interstate Commerce Act.

15. Your petitioner further represents and states that insofar as the Commission permitted the blanketing back of rates in order to meet the Fourth Section requirement of the Interstate Commerce Act, it has permitted and allowed the Chicago rate to intermediate points for a distance

of approximately 400 miles south of Chicago and St. Louis, while in the same proceeding the Commission required the Eastern shipper and seller and rail carrier to graduate the scale of rates, giving consideration to distance, and on the other hand, in connection with the rates from the Pacific Coast it has allowed Fourth Section relief, and by reason thereof shippers, refiners and purchasers at intermediate points contrasted with the other results in discrimination and undue preference and prejudice in violation of Section 2 and Section 3 of the Interstate Commerce Act. The Commission in its decision (Sheets 19-20) recognize these violations of the Act and makes no defense for said situation.

16. Your petitioner further states that in I. & S. 3814, the Commission's attention was specifically directed to the resultant rates that would be applicable to the movement of sugar from the gulf port to river ports and interior destinations, and to the disparity between these rates and the rates from the Atlantic seaboard to interior points which is permitted and allowed under the decision of the Commission (in connection with the rates proposed and justified or designated by the Commission), and to the fact that [fol. 24] there will be for similar distances from the gulf port and Atlantic a difference in rate of approximately 13 cents. The Commission in said decision recognizes this situation and that it will create violations of the Interstate Commerce Act but justifies said decisions upon the theory that the rail carriers intend to relieve and remove this situation. Your petitioner further respectfully represents and states that the order of the Commission therefore results in violation of Sections 2 and 3 of the Interstate Commerce Act and, therefore, is contrary to law and therefore illegal and unlawful and void.

17. Your petitioner further represents and states that the Commission in the justification and designation of the rates in the instant proceeding has brought about a situation which will result in a violation of the Fourth Section of the Act, and as a typical illustration of this situation states that the rates fixed from New Orleans or Jonesboro, Arkansas, for 486 miles is 34 cents, this point being intermediate to St. Louis, at which point the rate has been fixed at 32 cents and St. Louis is a farther distant point from New Orleans. That this and other rates are contrary to

the Fourth Section of the Interstate Commerce Act, and therefore contrary to law and therefore unlawful and void.

18. Your petitioner further represents and states that by reason of the matters and things above set forth the order of the Commission will result in a level of rates which will divert the movement of sugar tonnage from its line and operation to other forms of transportation, that it will necessarily result in the crippling or entire elimination of your petitioner's business.

That the Commission by virtue of its orders, Exhibits B [fol. 25] and C hereto attached, has designated and provided that the rail carriers presenting the tariffs above set forth shall be permitted and allowed, effective as of July 29, 1933, to base their rates on a minimum of 60,000 pounds in accordance with the proposal of the rail carriers and as justified by the Commission in said decision upon not less than five days' notice of the filing and posting of said rates in the manner prescribed in Section 6 of the Interstate Commerce Act; and by said order the Commission authorized the rail carriers proposing the rates and the tariffs above set forth to base their rates on a minimum of 80,000 pounds in accordance with certain rate levels designated in said order on or before September 5, 1933, but not prior to July 29, 1933, upon notice to the Commission and to the general public by not less than five days filing and posting in the manner prescribed by Section 6 of the Interstate Commerce Act to have said rates become effective. Your petitioner further represents and states that the carriers presenting the tariff involved in I. & S. 3814 have heretofore presented the rates here found justified and designated by the Commission on the 60,000 pound and 80,000 pound minimum in accordance with the provisions of law, and your petitioner further represents and states that since said rates have been permitted and allowed to go into effect by virtue of the invalid and unlawful orders as above set forth they have and will result in irreparable injury and damage to your petitioner, and that the allowance of said rates to become effective upon the dates cited or at any subsequent date will result in damage and irreparable injury to your petitioner.

[fol. 26] Your petitioner further states that the rates justified and permitted in the Commission's order produce the following result: The barge lines, in order to attract

and move sugar over their lines, will be required to publish rates under the all-rail rate, to-wit, differentials. This will cause the barge line to accept for movement of sugar over its lines less than actual or out of pocket cost for said service. Operation by privately owned barge lines, therefore, cannot continue, and operation of the Federal Barge Line will not be permitted to demonstrate the feasibility of water transportation. The effect is to take and indirectly confiscate the property of your petitioner by virtue of a decision and order of the Commission charged with the duty to preserve water transportation in full vigor.

19. Your petitioner further states that in connection with the above designated docket, I. & S. 3814, and associated cases, your petitioner filed a motion for rehearing and/or reargument and/or modification, and that in said motion your petitioner called the attention of the Interstate Commerce Commission specifically to changed conditions which had resulted subsequent to the hearing before the Commission, and requested the Commission by reason thereof to grant your petitioner a rehearing in said cause.

a. Your petitioner further states that the changed conditions alleged in said motion related to the depression and the change in business activities, and suggested that the National Industrial Recovery Act would result in a remedy and cure many of the conditions pertaining to competition and competitive rates by reason of the codes to be adopted by various transportation agencies, including barge lines.

[fol. 27] b. That Honorable Joseph B. Eastman had been appointed as Coordinator of Transportation under said enactment to plan exact regulation and coordination of all forms of transportation, and that various committees were now functioning for the purpose of securing regulation and coordination of said forms of transportation; and that said coordination of various forms of transportation made unnecessary the drastic cut in rail rates proposed by respondent carriers in said proceeding, which would result in a loss to the rail carriers of the United States in the approximate sum of $10,000,000 per year; that water

transportation had attempted to draw codes under and by virtue of which rates for water transportation would be placed upon a definite basis and upon a reasonable level, and that conditions have entirely changed in the respects above indicated since the hearing of the evidence and the making of the record in said cause before the Commission.

c. That the particular competition which was presented by respondents in connection with the competitive rates that rail lines had to meet had entirely changed and that the record before the Commission was stale; that the competition of the contract barge lines had entirely disappeared, with the exception of one particular line, which had recently increased its rates, and which made infrequent trips, and whose service was not upon regulated schedules; and that, therefore, the particular cost testified to before the Commission with reference to water-borne tonnage, and to the shipper, when said record was made, and the cost at the present time, were entirely different; that the only transportation agencies which were now moving substantial tonnage of sugar from the Gulf ports to [fol. 28] St. Louis, Missouri, and related destinations were the certificated barge lines, including your petitioner, and that the rates charged by them on port to port movements from New Orleans to St. Louis are 37 and 42 cents, and that, therefore, there was no reason to reduce the rail rates to the level designated by the Commission in order to meet any competitive transportation service; that in said motion for rehearing, your petitioner specifically set forth that the particular rates found justified or designated by the Commission were far below the rates for the movement of sugar by water transportation from the Gulf to Ohio and Mississippi River ports, and that under the rates proposed or designated water transportation could not continue as a profitable venture.

Your petitioner further states that said motion was duly forwarded to the Interstate Commerce Commission, and on, to-wit, July 25, 1933; and your petitioner further states that said motion for rehearing was overruled by the Interstate Commerce Commission on the date of August 3, 1933; and your petitioner further represents and states that said petition for rehearing was in the nature of a supplemental bill, presented a new and radically dif-

ferent situation which had supervened since the record before the Commission was made, and that by reason of said changed condition it was mandatory upon the Commission to grant petitioner's motion in order that a fair hearing could be obtained; that said petition was suitably presented in accordance with the rules of the Commission, and that the denial by said Commission of said petition for rehearing was a denial of a right guaranteed by law.

Wherefore, your petitioner states that said action on [fol. 29] the part of the Interstate Commerce Commission was unlawful, and that said order of said Commission is invalid.

Your petitioner hereto attaches and by reference makes a part of this petition said motion for rehearing in its entirety, and specifically calls the court's attention to that portion of said motion beginning with page 2 and ending on page 18, as indicated in said printed document.

Your petitioner further represents and states that when it was advised of the decision of the Commission and the orders relating thereto, and by virtue of said orders the Interstate Commerce Commission authorized and empowered said rail carriers to put said rates into effect on July 29th and 31st, respectively, it advised said Commission that it was the intent and purpose of your petitioner in said proceeding to file a suit to enjoin the order of said Commission, and further advised said Commission that the District Judges of the United States District Court at St. Louis, Missouri, were away from the City and it was, therefore, impossible to secure an interlocutory stay or order before the effective dates of said rates, and requested the Commission to change the effective date of said rates so that your petitioner could secure and arrange for an expedited hearing by a three-judge court and thus hold said rates in abeyance until a decision had been rendered by said three-judge court.

Your petitioner further represents and states that on the same date, to-wit, July 26, 1933, the Interstate Commerce Commission, through its Chairman, advised that the Commission could not consistently comply with the above request, and that said Commission by its action permitted and allowed said rates to become effective.

[fol. 30] Your petitioner further represents and states that it has used due diligence in an effort to prevent said rates becoming effective, and your petitioner states that the rates which are now in effect are in effect solely by reason of the failure of the Commission to extend the effective date of said rates.

20. Your petitioner further represents and states that by reason of the foregoing, such order of the Commission is erroneous, unlawful and invalid, in that it is inconsistent within itself, that it is legally arbitrary, is without substantial evidence to support it, it is discriminatory as above set forth in violation of Section 2 of the Interstate Commerce Act, is unduly preferential to certain particular origins in violation of Section 3 of the Interstate Commerce Act, is contrary to Section 4 of the Interstate Commerce Act, that it is unlawful and void by reason that it violates the mandate of Congress, Section 500 of the Transportation Act, and is unlawful and void in that it violates the Anti-Trust Law and Section 1 of the Sherman Act and in the particulars above specifically set forth. That it confiscates petitioner's property.

Your petitioner further represents and states that the matters and things here involved and the suit here instituted was brought to suspend and set aside in whole or in part an order of the Interstate Commerce Commission and that the same is brought in the Judicial District wherein is the residence, domicile or principal place of business of a party or one of the parties upon whose petition the order was made and in the district where the matter complained of in the petition before the Commission arises, and that your petitioner has its principal operating office within this district.

[fol. 31] Wherefore, your petitioner therefore prays that a subpœna or subpœna in chancery issue out of and under the seal of this Honorable Court directed to the defendants as required by law and that due and proper service of such process and of this amended petition be forthwith made by filing a copy thereof in the office of the Secretary of the Interstate Commerce Commission, and another copy in the Department of Justice as in said District Court Jurisdiction Act is provided, and that thereby the defendants and each of them be required on or before a date to be

specified in such subpœna or notice to appear herein and answer this amended petition, but not under oath, answer under oath being hereby expressly waived.

That a temporary or interlocutory injunction be entered herein restraining, enjoining and suspending until the further order of the court the effect and enforcement of said order of the Commission.

That pending a hearing upon the aforesaid application for a temporary or interlocutory injunction a preliminary restraining order be issued in terms restraining, enjoining and suspending the enforcement of said order of the Commission until said application for a temporary or interlocutory injunction shall have been heard and determined.

That after final hearing this Court shall adjudge, order and decree that said order of the Commission is and has at all times been wholly void, and that said order be perpetually set aside, suspended and annulled and the enforcement thereof perpetually enjoined.

[fols. 32 & 33] That your petitioner shall have such other and further relief in the premises as equity and justice may appertain and as may be deemed by this Honorable Court to be adequate and proper under the circumstances.

Mississippi Valley Barge Line Company, by L. W. Childress, President; by Thompson, Mitchell, Thompson & Young; by (Sig.) J. R. Van Slyke, J. R. Van Slyke, Attorneys for Petitioners.

Duly sworn to by M. W. Howe. Jurat omitted in printing.

[fol. 34] EXHIBIT "B" TO AMEND PETITION

INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket No. 38141

Sugar From Gulf and South Atlantic Points

Sugar Cases of 1933

Submitted March 2, 1933 Decided July 3, 1933

1. Proposed reduced rates on sugar, in carloads, from eastern cities on and near the Atlantic seaboard to points in central territory found justified. Order of suspension vacated and proceeding discontinued.

2. Proposed reduced rates on sugar, in carloads, minimum 80,000 pounds, from southern refining points to Chicago, Ill., St. Louis, Mo., and other destinations in the so-called Illinois district and in intermediate territory found not justified. Suspended schedules ordered canceled without prejudice to the filing of new ones providing rates 4 cents higher. Proposed reduced rates on like traffic, minimum 60,000 pounds, found justified and order of suspension vacated. Proceeding discontinued.

3. Proposed reduced rates on sugar, in carloads, from Louisiana refining points to points in the northern half of Arkansas, the southeastern part of Missouri, and the extreme eastern part of Oklahoma found not justified. Suspended schedules ordered canceled without prejudice to the filing of new ones on basis of 20 per cent of first class. Proceeding discontinued.

4. Upon reargument, transcontinental carriers granted fourth-section authority, subject to conditions, to establish lower rates on sugar, in carloads, from San Francisco Bay points to Chicago, Ill., St. Louis, Mo., and related points than to intermediate points. Previous report, 186 I. C. C. 523.

5. Western carriers granted fourth-section authority, subject to conditions, to establish lower rates on sugar, in carloads, from Western beet-sugar manufacturing points to Chicago, St. Louis, and related points than to intermediate points.

This report also embraces Investigation and Suspension Docket No. 3829, Sugar from Eastern Points to Central Territory; Investigation and Suspension Docket No. 3837, Sugar from New Orleans to Arkansas, Missouri, and Oklahoma; Fourth-Section Application No. 14080, on reargument; and Fourth-Section Application No. 14816.

Elmer A. Smith, W. N. McGehee, Frank W. Gwathmey, Charles D. Drayton, Wm. C. Burger, E. L. Beach, E. H. Burgess, Walter McFarland, J. M. Souby, J. E. Lyons, G. H. Muckley, John Q. Dier, L. E. Kipp, J. G. Kerr, J. E. Dimond, C. H. Pistor, H. B. Muller, H. V. Cook, F. A. Key, G. A. Hoffelder, J. E. Davis, S. P. Kelly, R. I. Miles, A. L. Burford, M. G. Roberts, Robert Thompson, W. E. Davis,

H. H. Larimore, Geo. W. Holmes, and C. M. Spence for rail carriers.

[fol. 35] Harry C. Ames, Phil G. Safford, J. R. Van Slyke, L. D. Chaffee, Nuel D. Belnap, Luther M. Walter, John S. Burchmore, Charles E. Cotterill, and Frank Lyon for water carriers.

P. M. Ripley, V. K. Raymond, R. W. Kruse, William A. Angus, C. R. Hillyer, W. W. Tommins, J. F. Harahan, Robert E. Quirk, Lowe P. Siddons, Elmer Westlake, and Parker McCollester for sugar refiners and manufacturers.

John J. Esch, Lachlan Macleay, Cleveland A. Newton, C. B. Bee, H. L. Bennett, I. G. Bentley, Edgar Moulton, C. A. Mitchell, H. E. Ketner, Carl Giessow, Ray Williams, W. A. Knight, Charles R. Seal, H. J. Wagner, H. E. Manghum, T. D. Geoghegan, George W. Thomas, Edward E. Wheeler, E. R. Griffin, H. F. Lambert, Stephen H. Love, and M. P. Hester for other parties.

Report of the Commission

By the COMMISSION:

These five cases represent collectively a contest among railroad, water, and motor-truck carriers for that great volume of carload sugar traffic which moves from Atlantic and Pacific coast and Louisiana cane-sugar refining points and from interior beet-sugar manufacturing points to central territory and certain middle western points, and particularly to Chicago, Ill., the country's largest market. They, of course, involve indirectly business strife among sugar interests having plants at competing origin points. In the main they embrace the same traffic as Sugar Cases of 1922, 81 I. C. C. 448, out of which came a general readjustment of the all-rail sugar rates, representing a compromise on the part of the principal shippers and rail carriers, which has stood without substantial modification for about 10 years. However, conditions have now materially changed. Into the transportation field have lately come new and powerful competitive forces in the form of water and truck carriers that maintain much lower rates than the rail carriers. They have made serious inroads on the traffic of the latter carriers and are threatening soon to take still more of it. To cope with the situation the re-

spective sets of rail carriers serving the origin groups mentioned are here seeking, independently of each other, drastic, sweeping, and quick reductions in rates. They are doing so with the hope of retrieving their losses of traffic and increasing their revenues to at least some extent. If the proposed reductions do not have the desired result and revenues from sugar go still lower, the rail carriers expect to console themselves with the thought that the present rates, if continued, would cause them even greater losses. In other words, they are willing to make these reductions rather than run the risk of the further losses which continued maintenance of the existing rates might entail. Their proposals are thus largely in the nature of insurance measures against undue losses in the future. The rail carriers feel that they should at least be given an opportunity to test the effect of these reductions. They may consider even lower rates if those proposed are established and do not prove sufficiently effective. They are in poor financial condition and need increased revenue.

While the loss of traffic by the rail carriers is a matter for our serious consideration, the rights of the water and truck carriers and the value of their services to the public must not be overlooked. This is particularly true with respect to certain barge lines operating on the Mississippi, Ohio, and Illinois Rivers under our findings of public con- [fol. 36] venience and necessity. See Procedure Under Barge Line Act, 148 I. C. C. 129; Through Routes and Joint Rates, 153 I. C. C. 129; Application of Mississippi Valley B. L. Co., 167 I. C. C. 41; Application of American B. L. Co., 182 I. C. C. 521; and subsequent reports.

The rail carriers urge that they should be left reasonably free in the exercise of their managerial discretion and that they are within their legal rights in attempting to put the proposed reductions into effect. Protestants' contentions are principally that respondents have abused their managerial discretion, that the proposed reduced rates are not reasonably compensatory, that they are lower than competition justifies, that they would unduly harm the water and truck carriers, disturb long-existing railroad rate relationships, bring on a collapse of the railroad sugar-rate structure, and result in needless sacrifices of revenue.

Rates and other charges referred to herein will be stated in cents per 100 pounds, and the rates of carriers subject to

our jurisdiction include the present authorized emergency surcharge of 2 cents, except as otherwise indicated.

Investigation and Suspension Docket No. 3829

Fifth class has applied for years on sugar from eastern cities on and near the Atlantic seaboard to points in central territory. The present fifth-class rates are 35 per cent of first-class. They were established December 3, 1931, in purported conformity with the recent eastern class-rate revision. By schedules filed to become effective November 15, 1932, and later dates, respondents, the standard and differential all-rail and rail-and-water lines of the seaboard, proposed to reduce their rates on domestic and import refined sugar from and to the points just mentioned to 25 per cent of first class for application until March 31, 1933, when the surcharge was to have been eliminated, and by schedules filed to become effective to April 1, 1933, to apply 27.5 per cent of first class for the balance of the year, without the surcharge. The latter rates are only a cent or two higher than rates on the 25 per cent basis with the surcharge added. The date for the expiration of the surcharge has been postponed to September 30, 1933, but no change has been made accordingly in the terms of the suspended schedules. As the 27.5 per cent rates are published to expire December 31, 1933, the fifth-class rates would be reestablished automatically unless other rates were published in lieu thereof. Respondents desire, by the time limitation, to leave themselves free to meet the situation later in the light of their experience and developments in the meantime. Upon protest we suspended operation of the schedules providing the 25 per cent basis until June 15, 1933, and the others until November 1, 1933. No changes are proposed in the present minimum weights, which are 40,000 pounds to points east of the Indiana-Illinois State line and 60,000 pounds west thereof. This case and the one next dealt with are presented on a common record.

During the four-year period from 1929 to 1932 respondents' sugar traffic from eastern refiners to central territory fell from 415,560 tons to 309,590 tons. By far the greater part of this loss of nearly 106,000 tons occurred in 1932. Most of it appears to have been due to the movement of sugar by other carriers, as the best available data in-

dicate that there was only about a 10 or 12 per cent diminution in the country's consumption. During the same period the sugar traffic of the eastern refiners shipped over water [fol. 37] lines operating from New York, N. Y., by the Hudson River, New York State Barge Canal, and Great Lakes increased from 160,450 tons to 269,000 tons. The movement was almost entirely to Chicago, Detroit, Mich., and Toledo and Cleveland, Ohio, Chicago getting perhaps much more than any other city. In 1932 there were likewise shipped to Chicago over the above route about 60,000 tons of sugar brought through the Panama Canal from San Francisco Bay points and 73,000 tons of import sugar. There was also a movement of 10,000 tons of refined sugar from Havana, Cuba, to Chicago by ocean steamer as far as Montreal, Canada, and thence by lake vessel to Chicago. The water-borne sugar was not all consumed at the lake ports, large quantities having been stored and later distributed by rail or truck to interior points, principally in the southern part of Michigan and the northern parts of Illinois, Indiana, and Ohio. The equivalent of two carloads per week moved by truck from New York City to Akron and Canton, Ohio. There was a large movement in barges from the New Orleans, La., district to St. Louis, Mo., and Peoria and Cairo, Ill., whence it was distributed into Illinois and western Indiana. There was likewise a substantial movement by barge from the New Orleans district to Evansville, Ind., whence it was distributed inland. Cincinnati, Ohio, and Louisville, Ky., received sugar by barge from the New Orleans district and no doubt shipped out some to the interior. Central territory is practically surrounded by water-competitive points that distribute water-borne sugar.

Seeing their traffic slipping away, respondents set out to regain it or at least minimize their future losses. They consulted shippers, gathered data as to the water and truck rates and the value of the water and truck services, and became convinced that substantial reductions in their rates were necessary. They first decided to meet the situation by generally reduced rates from the East to central territory on the domestic sixth-class basis, subject to the exception that the port differentials generally applied on import traffic were to be applied to both import and domestic sugar. In July, 1932, they accordingly applied to us for certain circuitous-route fourth-section relief inci-

dent to the exception mentioned, but the application was soon withdrawn because of the delay entailed and because of technical tariff complications.

By the proposed rates, representing reductions of about 27 per cent, respondents hope to divert sufficient traffic from the water and truck carriers to more than offset the revenue they would lose on the traffic that would move by rail regardless of the reductions. The reductions would result in a loss of revenue if respondents did not increase their sugar traffic by about 40 per cent, or 125,000 tons. If a revenue loss results, respondents, as already indicated, are willing to take it to avoid the greater loss that might result from continued maintenance of the present rates.

Respondents are not undertaking to meet the water and truck competition with exactitude at any particular point. They regard the competition as too widespread and the situation as too involved to be so dealt with. They are proposing general reductions because they are convinced that the general level of their sugar rates, though reasonable, is too high as a practical business proposition. Within and between trunk-line and New England territories they have already reduced their rates to the class basis here proposed. Their schedules providing these reductions, filed at about the same time as the ones here under review, were protested but not suspended.

[fol. 38] Just what rates the water carriers are charging is impossible to say. Being unregulated, they do not have to publish their rates, are free to change them at will without previous notice, may pay rebates, give allowances, make absorptions, provide storage, perform special services, allow special privileges, and otherwise, secretly or openly, favor individual shippers. The record indicates that these things, representing concessions of several cents per 100 pounds, are indulged in to a very considerable extent by water carriers from New York. As they are matters particularly within the knowledge of the water carriers and as those carriers have not offered us sufficiently definite advice in regard thereto, we may be justified in giving respondents the benefit of any doubts. What is here said about the water rates is also more or less true of the truck rates. The water and truck-rate data used herein were compiled in 1932. There is no telling whether or not

the same rates will be applied this year. They may be several cents higher or lower.

The indications of record are that most of the eastern refined and import sugar that went through the New York State Barge Canal in 1932 moved from New York to the lake ports of Chicago, Detroit, Toledo, and Cleveland at an initially charged rate of about 27 cents, generally subject to a minimum of 200 tons. By "initially charged" rate we mean the rate applied when the shipment was billed out, as distinguishable from the rate ultimately charged under any rebating arrangements, which may or may not have included free accessorial services. In many instances, affecting a large portion of the traffic, the rates initially charged ranged from 22 to 25 cents. Rates of 22 and 23 cents were more or less generally available to Cleveland and Detroit. Those to Cleveland were applicable even during the winter, trucks being used by the lake carriers instead of vessels west of Buffalo, N. Y. The rates mentioned generally included the cost of loading, unloading on warehouse floors or into cars at the destination water front, and marine insurance. Some included a month's free storage. A large eastern refiner was quoted a rate from New York to Chicago of 16.25 cents, subject to a 2,000-ton minimum, but it did not include loading, unloading, and marine insurance, which cost about 5 cents. Another was quoted a rate of 18 cents, which included marine insurance and unloading at a specified wharf. Neither of these rates was used, however, as they were quoted by weak lines; the refiners preferred to patronize the strong standard lines. The through all-water rate charged on half the Cuban refined sugar moved as previously indicated from Havana to Chicago was 27.5 cents and that on the other half 33.5 cents. These rates were exclusive of marine insurance, which amounted to about 4 cents, but included unloading at a specified wharf at destination. A rate of 32.25 cents, minimum 20,000 bags, was quoted for application from a New Orleans wharf by seatrain to New York and thence to Chicago by river, canal, and lake. The average rate initially charged from New York on the traffic moved by water was evidently less than 27 cents, but perhaps more than 22 cents, and probably about as low to Chicago as to the lake ports east thereof. The truck rate from New York to Canton and Akron was 32 cents. From New Orleans the barge rates,

inclusive of loading, unloading, and marine insurance, were generally 44 cents to Cincinnati and Louisville, 42 cents to Evansville and St. Louis, 39 cents to Cairo, and 43 cents to Peoria. One barge line, however, maintained rates 3 cents lower to most of these points. Another announced rates to most of the Ohio River cities of 25 cents or there-
[fol. 39] abouts, but these were increased 3 cents in the late Fall. They did not include loading. In the case next considered we deal in more detail with barge rates from the New Orleans district to St. Louis and Ohio River cities. With the opening of the Illinois Waterway this Spring a through navigable route is available between New Orleans and Chicago. Rates that would meet the competition of water lines from New York to Chicago may soon be announced by barge operators from New Orleans. The truck rates that apply from the lake-port and river-landing cities to interior points for hauls up to about 150 miles apparently range from about 7 to 18 cents.

Terminal expenses at the lake-port and river-landing cities on water-borne sugar exceed those on sugar that moves by rail. As the water-borne sugar comes in large quantities, most of it must be stored until disposed of. The period of storage varies widely, but stocks accumulated in the late Fall to provide for the four or five-month period of closed navigation are, of course, subject to the most storage expense. There are various transfer services. For instance, some of the sugar may go directly from the water craft to trucks for immediate distribution locally or to the interior, some from the water craft to a warehouse at the water front for later distribution, and some switched or trucked from the water craft to a distant factory or warehouse in the same city for immediate consumption or later distribution. The total terminal expenses vary from perhaps nothing to 8 cents. The indications are that they ordinarily amount to 3 or 4 cents. They are greater at Chicago than at other lake ports. Most of them are avoided in shipping by rail, except on the limited amount of rail-carried sugar that is stored pending distribution.

After inquiring into the question of what the water and truck rates are and what should be added roughly to represent unknown amounts for storage, switching transfer, and other services, we are faced with the question of how much more the rail service is worth in actual practice. Rail ship-

ments generally reach destination in from four to six days, but water shipments are on the way two or three weeks. Rail service is also superior in that it is safer, involves less handling of and damage to packages, is more regular, and otherwise more dependable. Shipments by rail can be reconsigned or stopped in transit for partial unloading at nominal charges. However, unlike water service, rail service does not include loading and unloading, which cost the shipper perhaps 3 or 4 cents per 100 pounds. Water service can be used for a large part of the traffic without great inconvenience or disadvantage, rapid transit being generally unnecessary, but in certain respects, particularly at times, water service is not suitable for special shipments. Sugar lends itself to storage in large quantities, and distribution from warehouses by truck in small amounts is popular with the trade. Water service is never more desirable than rail service, except for reasons of economy or where slow movement is desired as a substitute for storage or in the case of a rising market. The traffic manager of one of the New York refiners testified that he would expect to ship a reasonable proportion of his sugar by rail at a rate 10 cents above the water rate. He thought that that difference would provide equality of opportunity for the rail lines as against the water lines. This expression would be more helpful if we were sure that most of the shippers concurred therein. During these days when business men have to watch every penny there is a strong inclination to use the cheapest mode of transportation, even though not altogether satisfactory. It would also be more [fol. 40] helpful if we knew what the water rates were. If some water shipments pay 22 cents and others as much as 27 cents, the question arises as to what the rail rate should be.

The following table shows the standard lines' all-rail column 27.5 rates proposed for application to sugar, not to be increased by the surcharge, to representative points:

To	From			
	Boston, Mass.	New York, N. Y.	Philadelphia, Pa.	Baltimore, Md.
	Cents	Cents	Cents	Cents
Youngstown, Ohio	34	30	27	26
Canton, Ohio	35	31	29	27
Akron, Ohio	35	32	29	28
Cleveland, Ohio	34	32	29	28
Columbus, Ohio	38	34	32	29
Toledo, Ohio	36	34	34	33
Cincinnati, Ohio	41	37	35	32
Flint, Mich	36	35	35	35
Detroit, Mich	36	34	34	33
Grand Rapids, Mich	39	39	39	37
Indianapolis, Ind	41	39	37	35
Louisville, Ky	43	41	39	36
Evansville, Ind	46	44	42	40
Traverse City, Mich	43	42	42	42
Chicago, Ill	42	42	40	39
Peoria, Ill	45	45	43	41
St. Louis, Mo	48	46	44	42

The proposed rates of the differential lines, operating over circuitous rail routes and by ocean-and-rail, rail-and-lake, or ocean-rail-and-lake, particularly to points in the western half of central territory, range several cents lower. For instance, the proposed rate from New York to Chicago over a circuitous ocean-rail-and-lake line operating through New England and Canada is 35 cents, compared with the proposed all-rail rate of 42 cents.

The proposed rates from Philadelphia, Pa., and Baltimore, Md., range from 1 to 5 cents lower than those from New York, not because there is any water competition that justifies the differences, but because these cities are generally closer to central territory and under the distance adjustment naturally get the benefit of their location.

The proposed rates, like respondents' present rates, increase substantially with distance as we proceed westward, but the water rates from New York do not, being apparently much the same to all ports west of Buffalo. The water-truck combinations increase according to distance as we proceed in various directions from the lake ports and the river landings. As a result of this crossfire the proposed rates to some points are unquestionably too low and to others certainly too high from a competitive standpoint. Exact comparisons for the purpose of illustrating the situation are difficult to make. They depend upon the distance of the destination from the seaboard, the lake-port or river-

landing used for making the combinations of water and truck rates, the lengths of the truck hauls, the assumed amounts of the water and truck rates, and the amounts, [fol. 41] if any, added for lake port or river landing storage, switching, and transfer charges. To many points in southeastern Michigan, northeastern Indiana, and northern Ohio the proposed rates are about the same as, if not somewhat lower than, the water-truck combinations on Lake Erie ports, and to many points in southern Ohio and Indiana they are much lower than the water-truck combinations on Cincinnati and Louisville. Even to some water-competitive points, Cincinnati and Cleveland, for instance, they are about as low or lower than some of the water rates. To some interior points, even the present rates might be low enough. However, with respect to many other points, the reverse is true, particularly so far as those in the western-southwestern half of central territory are concerned, where respondents are less interested, because there the proposed rates reflect the upper measures of the all-rail scale, while the water rates from New York to Chicago and from New Orleans to Chicago, St. Louis, Peoria, Cairo, and Evansville plus the truck rates beyond make low combinations. Respondents urge that the proposed rates to the interior points on the whole approximate the water-truck combinations, and that this substantial parity is necessary if respondents are to have equality of opportunity with their competitors, for a dealer in central territory may order sugar in comparatively small quantities from nearby lake-port and river-landing cities and get quick delivery by truck, whereas if he bought at the seaboard he would have to order a full carload or join with other parties in ordering such a shipment.

Meeting the competition at each point in central territory only where and to the extent that it exists would obviously warrant much lower rates as some water-competitive points, such as Chicago and St. Louis, than at interior points, and lower rates at some interior points than at other points intermediate thereto, but respondents decided not to adopt that method of dealing with the situation, as they realized that the establishment of the necessary rates would be long delayed, if not prevented, by fourth-section complications. If the rates to points like Chicago and St. Louis were made much lower than respondents propose

and the long-and-short-haul rule observed, they would cut far back into the interior and result in lower rates to many interior points than are proposed and entail undue revenue sacrifices. Moreover, the public gets certain commercial and economic benefits from the observance of the long-and-short-haul rule, and ill feeling is avoided. However, respondents may later seek supplementary reductions and fourth-section relief to meet the competition at such points as Chicago and St. Louis, especially of the lower rates to those points now proposed by the carriers from Louisiana points and Savannah, and hereinafter considered, become effective. Prior to Federal control, to meet competition from New Orleans, respondents maintained under appropriate fourth-section authority lower rates from the Atlantic seaboard to points in this territory, such as St. Louis, than to intermediate points, such as Indianapolis.

The record clearly indicates that the proposed rates to Chicago and other points in the western-southwestern half of central territory are not sufficiently low to bring respondents a relatively large amount of additional traffic, but they should attract much, if not most, of the business to points in the eastern-northeastern half of that territory, particularly interior points. Respondents, by securing the traffic to the interior points would stop most of the distribution from Lake Erie ports and upper Ohio River lands and thus confine the water movement to those points prin- [fol. 42] cipally to sugar for local consumption. They feel that if they must practically give up the traffic going to Chicago and some of the other water-competitive points for local consumption, they should be allowed to take most of the traffic destined to the interior.

Refiners favor the reductions. They have no particular interest in the intrinsic level of properly related rates, as the freight charges are generally borne by other parties, but they prefer to use the railroads for most of their traffic if the rates of the different transportation agencies were on a parity, service considered. They desire the rail lines to be strong and dominant in the field of transportation. They are less interested in the other carriers, because the rates they charge are unknown, unstable, result in discrimination, and have the effect of disturbing the sugar-price structure. Delivered prices of sugar in central territory are generally made on the seaboard refinery base price plus the

"freight selling basis;" which is the amount added to the base price to make the delivered price at a given destination. Formerly the freight selling basis generally represented the rail freight rate from the refinery having the lowest rate to that destination, but recently it has come to reflect water or water-truck rates, particularly if the amount of sugar moved at such rates is sufficient to control the delivered price. The freight selling basis at Chicago, for instance, which a couple of years ago was 49.5 cents, representing the rail-and-lake rate from Philadelphia, is now 32 cents, or 5 cents above the maximum water rate from New York. Some sugar was recently sold there on a 27.5 cent basis. The freight selling basis may in instances reflect not merely rates but sales efforts, market gluts, and other trade conditions. A considerable quantity of sugar is not now being bought delivered at destination on the freight selling basis, but f. o. b. refinery. In such cases the buyer arranges his own transportation and obtains such freight rates as he can. This has been one of the chief causes of the unsettlement and uncertainty in the sugar-price situation.

The Mississippi Valley Barge Line Company, a privately-owned water carrier operating between New Orleans and Mississippi and Ohio River cities, protests the proposed rates, except those from New York to Chicago and the other lake ports, principally on the ground that the proposed rates, particularly to interior points, are lower than necessary. It suggests that if respondents desire to meet the competition, they should do so, not by general reduction to a uniform basis, but by treating the rate from and to each point on its individual merits. Rates so made would involve general departures from the long-and-short-haul rule, which respondents desire to avoid, as already explained. Central territory is so hedged about by water-competitive points that protestant's idea is impractical. Moreover, the interstate commerce act contains such an affirmative prohibition of departures from the long-and-short-haul rule, except where a carrier is willing to create them and can justify them, that we should be extremely hesitant about forcing a carrier into a positon where it would have to depart from the rule or forego the traffic. [fol. 43] This feature of the case is distantly similar to Cement From Hudson, N. Y., 186 I. C. C. 8, where the Bos-

ton and Albany Railroad proposed reduced rates to meet truck competition to certain destinations and proposed to apply them also to intermediate points where there was no competitive necessity. We found that the reduced rates were justified to the more distant points but not to the intermediate points, and granted fourth-section relief accordingly. In that case, however, respondent practically applied for fourth-section relief, its counsel having stated upon argument that it had no desire to reduce its rates to intermediate points, but did so only because of the requirements of section 4 and that it was agreeable to a grant of fourth-section relief.

One of the principal protestants is an organization representing seven water carriers, operating on the New York State Barge Canal, which handle about 75 per cent of the total freight traffic moving through that waterway. One of the largest canal carriers, however, is not a member of the organization and took no part in the case. Some of the water craft of these carriers are modern motor ships that operate all the way between New York and Chicago, while others are barges that operate only east of Buffalo or Oswego, N. Y., their cargoes being transshipped at those points. None of the connecting lake carriers is before us. The protesting organization has formed a conference which has for one of its objects the discontinuance of rate cutting and rebating. Though it has apparently not yet accomplished much in the way of tangible results, its members hope that in 1933 they may be able to stabilize their rates on a higher level than obtained in 1932. Their traffic is principally eastbound grain and they accordingly have a great surplus of space westbound. The sugar traffic was practically the only traffic westbound in 1932 that did not show a falling off since 1929. Except for petroleum products, moving in tank barges, sugar in 1932 constituted over half of their westbound traffic and they are not disposed to give it up. They threaten reprisals in the shape of retaliatory rate reductions in the event respondents put the proposed rates into effect. They indicate that if they can not hold the sugar traffic they may raid other westbound traffic now being handled by the rail carriers. Whether their rates last year were on rock bottom and whether out-

of-pocket operating expenses would permit them to go lower, we are unable to say.

[fol. 44] The Farmers & Manufacturers Beet and Sugar Association, an organization of sugar-beet and beet-sugar producers in southeastern Michigan and adjacent portions of Ohio and Indiana, protests. The industries it represents furnish employment for thousands of farmers and factory hands and provide central-territory carriers with a heavy traffic, not only in sugar beets and beet sugar, but also in coal, coke, and lime rock. Their beet sugar is distributed almost entirely in central territory in competition with cane and beet sugar from other parts of the country. It is ordinarily sold delivered at a differential of about 15 cents per 100 pounds below the delivered cane-sugar prices made by adding to the seaboard price the freight selling bases, above described. The beet-sugar producers absorb, pocket, or "pick up" the differences in rates after deducting the price differential. Freight selling bases in central territory, many of which, because of low water-truck rates, are already below the former level based on rail rates, would be reduced, perhaps 10 cents on the average, and automatically result in reduced returns for beet-sugar manufacturers. Under a contract which makes the prices paid for sugar beets dependent on the returns of the sugar manufacturers, the losses, roughly estimated by protestant at $400,000 per year, would be divided between the farmers and manufacturers. Protestant urges that this would not be in the public interest, particularly in these times of general business depression and low commodity prices. To meet truck competition the rates from these beet-sugar producing points to much, if not most, of central territory were generally reduced last October to a maximum of 25 per cent of first class, many important rates being on even lower levels. The new rates were first published to apply until March 31, 1933, but are now published to continue until August 31, 1933. The manufacturers are still patronizing the trucks to a large extent and the rail carriers are giving consideration to the advisability of further extending the life of the reductions. As a rule the rates from the beet-sugar producing points are considerably lower than the present and proposed rates from the seaboard, as they apply for much shorter distances. While the proposed reductions from the seaboard are on a higher relative maximum

rate basis than those which were made last Fall from the beet-sugar producing points, they are naturally greater in cents per 100 pounds. Protestant urges that they would result in undue prejudice. Some of the carriers which serve the sugar-beet and beet-sugar territory and do not serve the seaboard are not favorably inclined toward the proposed rates, as they desire to protect the interests on their own lines, but they are in the minority and for various reasons find it desirable, or are forced, as a practical matter, to concur therein.

Like the other class rates from and to the points in question, the proposed sixth-class rates from Norfolk, Va., exceed those from Baltimore. The Norfolk Port-Traffic Commission objects. With respect to import class rates the two ports have for years been on a parity, but the application of these rates to sugar is proposed to be canceled because they exceed the proposed rates. The Virginia rail carriers desire to continue the parity on import sugar and the others are willing to give the matter serious consideration. Civic and commercial interests of Richmond, Va., ask for import rates no higher than those that may be applied from Norfolk. With such a one-sided showing we can only conclude that Baltimore, Norfolk, and Richmond should be on a parity with respect to import sugar.

No question can fairly be raised as to the proposed rates being high enough to yield considerably more than the cost of the service. They are not in the lower reaches of the scale. Sugar loads heavily, and it can probably be used to fill cars that would otherwise move west empty. The earnings on a normal shipment, about 50,000 pounds, at the [fol. 45] proposed rates from and to the principal points would range from about $145 to $210 for hauls ranging from about 500 to 900 miles. They would compare favorably with those under many rates prescribed by us on other commodities.

We find that respondents have justified rates made 27.5 per cent of first class, without the surcharge. Respondents are hereby authorized to establish such adjustment on one day's notice. An order will be entered vacating our order of suspension and discontinuing this proceeding.

Investigation and Suspension Docket No. 3814

By schedules filed to become effective October 1, 1932, and later dates, respondents, operating on both sides of

the Mississippi River, propose to reduce their rates on sugar from New Orleans, Savannah, Ga., and other southern refining points to Chicago, St. Louis, other points in the so-called Illinois district, including points on the west bank of the Mississippi River in Iowa and Missouri, and points as far north as Madison, Wis., but exclusive of Milwaukee, Wis., also to points in the territory intermediate thereto, principally in western and southern Indiana, and most of Kentucky and Tennessee, excluding Memphis, Tenn. Upon protest we suspended operation of the schedules until May 1, 1933. As the 2-cent surcharge was originally authorized to apply only until March 31, 1933, the schedules, for merely technical reasons, were by their terms limited to expire on that date, but respondents have announced their purpose of establishing the same total sum as rates for permanent application when and as the surcharge expires. In other words, the surcharge is to be added to, and merged into, each proposed rate and become an integral part thereof.

Respondents are hauling practically no sugar from and to the points considered. Nearly all of the Louisiana production sold in the destination territory mentioned and in contiguous territory goes by barge as far as St. Louis, Cairo, Peoria, Evansville, Louisville, Cincinnati, or Memphis, whence it is distributed to the interior as described in the first considered case. Most of it apparently did not get as far north as Chicago. In 1932 the barge movement amounted to over 500,000 tons, about 10 times as much as moved all-rail from Louisana points to the same territory. There were 4,000 tons from Savannah to Evansville and Louisville. By far the greater part of the water-borne traffic was carried by the Federal Barge Line, operated by the Government-owned Inland Waterways Corporation, on local rates or joint rates with the delivering rail carriers. A small proportion was similarly taken by the Mississippi Valley Barge Line and some by the American Barge Line Company. All three of these carriers, hereinafter called the standard barge lines, operated in connection with rail lines under our certificates of public convenience and necessity. The American Barge Line, much of whose business is merely towage service, does not have a complete system of joint rates on sugar in connection with rail lines, but has some arrangements of similar nature with truck lines. The

two latter-named carriers took some sugar at lower rates than were charged by the Federal Barge Line. They do not adhere absolutely to the usual differential basis on all traffic. Tramp, or contract, barge operators obtained considerable tonnage at still lower figures.

Until a few years ago respondents enjoyed the long hauls from the origin points on practically all this traffic, but now they generally receive only the hauls beyond the river-landing destinations on that part of the traffic which is not distributed therefrom by truck. The all-rail movement from Louisiana is now confined almost entirely to occa-
[fol. 46] sional, special, or emergency shipments. The diversion of the sugar traffic to the barge lines in 1932 cost the Illinois Central Railroad Company, the principal respondent, probably half a million dollars in revenue. This loss was due to the fact that respondent generally received on the traffic here considered only the revenue for the hauls beyond the river-landing destinations, based on its divisions of the joint rates with the barge lines, whereas previously it received the through charges for the long hauls from the refineries to the final destinations.

Respondents are here seeking not only some of the traffic which might otherwise move by barge lines from the New Orleans district, but naturally some of that which might otherwise come from different sources of supply, particularly that by water from New York and California. The prosperity of respondents depends upon that of the territory they serve and sugar refining is one of the principal industries on their lines in the South. The refiners there depend for their existence largely on their sales beyond the Ohio River and respondents accordingly desire to keep the northern markets open to them. Incidentally, the barge lines have already done much to that end.

Respondents propose two separate bases of rates from and to practically all the points considered, one subject to an 80,000-pound minimum and the other, on a somewhat higher level, subject to a 60,000-pound minimum. The rates with the 60,000-pound minimum are counterparts of the eastern carriers' proposal just considered, the proposed rate from New Orleans to Chicago, in accordance with a long-standing arrangement, being the same as that proposed from Baltimore to Chicago. However, respondents feel that these rates are too high to attract much business

and for that reason they propose the lower rates based on the 80,000-pound minimum, leaving those on the 60,000-pound minimum for dealers, principally at small interior points, who require limited quantities of sugar or whose storage facilities are limited. The lower rates would be used on most all the traffic, as they would result in the lower per-car charges except on shipments weighing not much in excess of 60,000 pounds. We will deal specifically only with these rates. The protests and the record relate to them almost entirely. The present minimum weight is 60,000 pounds, except to points on and south of the Ohio River, where it is 40,000 pounds. The present and proposed rates, as shown by the record, from the New Orleans district to the principal destinations are shown in the following table:

[fol. 47]

To	Distance Miles	Rates		
		Present	Proposed	
		Minimum 60,000 pounds to points north of Ohio River and 40,000 pounds to points on and south thereof Cents	Minimum 80,000 pounds Cents	Minimum 60,000 pounds Cents
Chicago, Ill	912	56	30	39
Madison, Wis	997	58.5		41 5
Dubuque, Iowa	1004	62	34	43
Peoria, Ill	830	56	30	39
Indianapolis, Ind	831	56	30	39
Cincinnati, Ohio	836	56	30	36
Louisville, Ky	747	56	30	36
Evansville, Ind	687	53	28	34
St. Louis, Mo	698	52	28	34
Cairo, Ill	554	48	28	30
Lexington, Ky	754	56	30	36
Chattanooga, Tenn	498	45	28	34
Covington, Tenn	432	43	28	

Respondents propose to accord Savannah the same basis as New Orleans on traffic to Chicago and to apply the Chicago rate as maximum at intermediate points. This will result in a parity also at Indianapolis and Ohio River cities.

No reductions are proposed in the standard barge and barge-rail rates from Louisiana points to the destinations considered, which rates are generally 10 cents lower than the all-rail rates. However, if the all-rail rates are reduced the barge lines will consider the establishment of lower rates. The 10-cent differential at present maintained represents 20 per cent of the New Orleans-St. Louis all-rail

rate of 50 cents, before adding the surcharge, the barge rate to St. Louis being made 80 per cent of the all-rail rate, and the resulting differential reflected in the joint barge-rail rates.

There are only two proposed rates that are of particular importance. One is the 30-cent rate to Chicago, which is blanketed back over direct routes almost as far south as St. Louis and over indirect routes via Louisville and Cincinnati almost into Tennessee, except that it would not apply to points on eastern lines. The other is the 28-cent rate to St. Louis, which is blanketed back into Kentucky and Tennessee, filling the territory south of the 30-cent blanket, until it meets the present existing lower rates at points in western Tennessee, and northern Mississippi, Alabama, and Georgia. The rates in the coastal-plains section of the Southeast were reduced last August to meet truck competition. They had been on the basis of 27.5 per cent of first class, prescribed for all the Southeast in Southeastern Sugar Investigation, 132 I. C. C. 477, but now range from about 15 to 20 per cent of first class.

The proposed rate of 30 cents from the New Orleans district to Chicago represents a 26-cent reduction in the present rate of 56 cents. The basis for the amount of the proposed rate is the New York-Chicago water rate, which we saw in the above-considered case was last year probably somewhere between 22 and 27 cents, but to which several cents should be added to represent extra terminal expenses [fol. 48] and rail service superiority. Protestant Mississippi Valley Barge Line suggests that we hold respondents to a rate of 40 cents at Chicago, which is the proposed rate that would have applied from New York to Chicago until March 31, 1933.

From the New Orleans district to St. Louis the proposed rate is 28 cents, 2 cents below that proposed to Chicago. It represents a reduction of 24 cents, the present rate being 52 cents. The standard barge-line rate from the New Orleans district to St. Louis was 42 cents, except that the Mississippi Valley Barge Line maintained a rate of 37 cents. This rate was established in anticipation of an announced contemplated reduction of 4.5 cents in the all-rail rate from Louisiana points to St. Louis due to the reduction in the fifth-class rate from Baltimore to Chicago brought about by the eastern class rate revision. The 28-

cent rate is based on competition with contract-barge operators on the Mississippi River. Rates from the New Orleans district to St. Louis as low as 19 cents have been quoted by contract-barge operators for the movement of large cargoes and a rate of 18 cents for this service is regarded as compensatory by parties that should be in position to know, but, so far as appears, such rates have not been used. The contract rate generally paid by one of the principal Louisiana refiners was 20 cents. It covered only transportation and did not include loading, unloading, or marine insurance. The charges for these incidental items, according to one of respondents' witnesses, an official of the refiner mentioned, was between 3 and 4 cents, but according to protestant's witness, a traffic official of the Mississippi Valley Barge Line, they are more nearly 9 cents.

The refiner has found from experience that it costs about 1 cent more to get sugar to the barges than on to the cars at point of origin, the average marine insurance charge is a little over three-quarters of a cent, and the average unloading and transfer charge at destination actually paid for movement from the barge to a nearby warehouse was generally 1.5 cents. Therefore, the total cost of shipping sugar by contract barge from New Orleans to St. Louis, according to respondents' witness, appears to be at least 23 cents. Protestant's witness estimates that the incidental charges for loading and unloading should be 2.5 cents and 3 cents, respectively, apparently assuming that there is no loading cost on shipments forwarded all-rail. His estimate of marine insurance charges corresponds substantially with that of respondents' witness. He estimates an expense of 2.5 cents at destination for switching and drayage, which is not borne out by the refiner's experience, but might represent other shippers' experience. He includes an item of one-quarter of a cent for damage due to a greater amount of handling of the package when shipped by water. Accepting protestant's estimates would make the rate from New Orleans to St. Louis 29 cents. Incidentally, the freight selling basis at St. Louis was at times, if not more or less generally, 30 cents, which fact, protestant says, supports its estimate.

The traffic manager of one of the principal refiners suggested 6 cents as a proper differential for the standard

barge lines under the all-rail lines. Accepting here a differential of 6 cents for the purpose of discussion and adding it to the 23-cent minimum contract-barge cost, on account of the superior service of the rail lines, makes 29 cents as a minimum from New Orleans to St. Louis, or 1 cent more than the corresponding proposed all-rail rate. Accordingly, even without taking into consideration the fact that most of the river-borne sugar must be stored longer pending distribution, the 28-cent rate may be too low from a competitive standpoint. If the usual 20 per cent differential were applied to that rate, it would reduce to 22.5 [fol. 49] cents the standard New Orleans-St. Louis barge rate, which would apply for a much more regular and perhaps otherwise more dependable, desirable, and valuable service than the contract-barge operators provide. It would no doubt stop the use of the contract barges. The maximum all-rail rate from the New Orleans district to St. Louis that would be necessary to narrow the regulated barge lines' differential to about 6 cents, if the 20 per cent basis were used, is 31 cents. The Mississippi Valley Barge Line suggests that we hold respondents to a rate of 38 cents at St. Louis, which, provided the 20 per cent basis is continued, would reduce the differential in its favor from 10 cents to 7.5 cents, and give protestant a rate of 30.5 cents. A 38-cent rate for respondents from the New Orleans district to St. Louis would far exceed the water rate from New York to Chicago. If the long-and-short-haul rule is to be observed, the rate from the New Orleans district to St. Louis can not exceed that from the same district to Chicago.

The proposed rate from the New Orleans district to Cincinnati and Louisville is 30 cents, the same as to Chicago, and that proposed to Evansville and Cairo 28 cents, the same as to St. Louis. As was stated in connection with the previously considered case, the standard barge rates, in 1932, inclusive of loading, unloading, and marine insurance, were 44 cents to Cincinnati and Louisville, 42 cents to Evansville, and 39 cents to Cairo. One of the standard barge lines, however, maintained rates several cents lower. Another would deliver Louisiana sugar at most of the Ohio River cities for about 26 cents until late Fall and 28 cents thereafter. This figure did not include loading. The water rate from Savannah to Louisville was 37 cents. Approval of the proposed rate and application of the 20 per cent dif-

ferential for the standard barge lines would make rates from the New Orleans district for those lines of 24 cents to Cincinnati and Louisville and 22.5 cents to Evansville and Cairo. The Mississippi Valley Barge Line suggests that we hold respondents to rates of 43 cents to Cincinnati, Louisville, and Evansville, and 38 cents to Cairo. Cairo interests urge that the proposed rates should be lower to Cairo than to St. Louis, because the distance is shorter.

While, as we have seen, the eastern carriers are making no special effort to meet the competition at any particular point, the southern lines are doing just the opposite, so far as Chicago and St. Louis are concerned. Respondents are more interested in reaching these markets than are the eastern carriers and their revenues would be less adversely affected by applying their proposed Chicago and St. Louis rates as maxima at intermediate points than would the revenues of the eastern carriers, if the latter adopted those rates and followed the same policy.

The proposed rates to the water-competitive points, as applied also to the interior points in the intermediate territory, are generally lower than the water-truck combinations. The record does not afford exact figures, but we can illustrate the situation by rough estimates. The truck rates for distances up to about 150 miles probably range from 7 to 18 cents. Adding these figures to the New York-Chicago water rates, ranging from 22 to 27 cents, we have combinations to central and northern Illinois points ranging from about 29 to 45 cents, to be compared with the proposed all-rail rate of 30 cents. Adding similar truck rates to standard and contract-barge rates ranging upward from at least 23 cents from the New Orleans district to St. Louis, Peoria, Cairo, Evansville, Louisville, Cincinnati, and Memphis would produce rates to interior points both north and south of the Ohio River more or less similar to those made [fol. 50] to Illinois points on the Chicago combination just mentioned. Accordingly, the usual water-truck rates to interior points north and south of the Ohio River are probably from 5 to 15 cents higher than the proposed all-rail rates of 28 and 30 cents. This situation could be avoided by respondents giving up most of the business at water-competitive points or departing from the long-and-short-haul rule, but they do not desire to do either. The proposed rates, as applied to the interior points alone, would

probably bring respondents a heavy traffic, would stop a large part of the distribution of water-borne sugar, and dry up much of the water movement.

Protestants urge that the proposed rates to interior points are less than necessary to meet competition, particularly in view of the superior service by rail, and would be unduly detrimental to the water and truck carriers. Respondents explain that the proposed rates to the water-competitive points are blanketed to the interior not only because of uncertainties and difficulties attending applications for fourth-section relief, but because they consider it desirable from a commercial and economic point of view to keep interior dealers on a parity; also to avoid a complicated rate structure, rate controversies, and ill feeling; and because low rates from the New Orleans district are needed to offset the disadvantages some dealers would suffer in ordering an 80,000-pound carload, when they can follow a hand-to-mouth policy, buying in small lots from a nearby distributing center and receiving quick delivery by truck. One of the main questions in this connection is whether respondents should be allowed to establish a rate to a water-competitive point, Chicago for instance, made solely with regard to water competition at that point, and then blanket it to the interior; whether they should average the situation at all the points, as the eastern lines have done, and publish a higher general basis than they propose; or whether they should establish lower rates to water-competitive points than to the interior and in doing so depart from the long-and-short-haul rule. Prior to Federal control, to meet competition from the East, lower rates were in effect from the New Orleans district to Chicago, St. Louis, and Ohio River crossings than to intermediate points.

The practice of shipping sugar in contract barges developed rapidly last year. At least two of the largest refiners resorted to it as a means of meeting the flood of sugar moving by water from the East and California. One refiner financed barge operations and was thus in position to dictate the rates to be charged. It furnished the contract barges with two-thirds of their sugar traffic. It expects to continue to ship much, if not most, of its sugar this year by barge even if the proposed rates are established. Such use as it would make of the all-rail rate would be during the winter. It seems to have no doubt about its

ability to obtain a sufficient supply of contract water craft in the future. The refiners have had no difficulty in this respect so far. Just where they might find sufficient facilities to carry the bulk of the sugar in the future is not clear, but among other privately-owned facilities that may be available are those used for the southbound movement of steel. They were used to some extent last year. Respondents are apprehensive about the situation and are convinced that it requires quick action. They fear that if the present tendency is not stopped all the refiners, to protect themselves, will use contract barges or provide their own barges for most of the traffic. Petroleum, steel, and cotton interests have already entered the river-transportation business to a greater or less extent. One of the main purposes of the proposal is, therefore, to discourage the refiners in providing their own means of transportation or patronizing [fol. 51] operators of contract barges. The mere publication of the proposed rates has already deterred one refiner from increasing its river terminal facilities.

While respondents regard the contract-barge rates as determining factors, standard barge lines do not take them very seriously. The low rates of contract-barge operators have not had the adverse effect on the traffic of the standard barge lines that they have had on the rail lines. In 1932 the standard barge lines, generally with a 42-cent rate to St. Louis, took about nine-tenths of the sugar that moved northbound from Louisiana, notwithstanding the much lower rates of the contract-barge operators. They handled about as much in 1932 as in 1931. The slow, sporadic, and uncertain service of the contract barges is unsatisfactory to some shippers. It is used only to supplement other transportation. Instances are cited in which contract-barge tows took six or seven weeks to reach St. Louis. At times the Mississippi River north of Cairo is difficult to navigate with low-powered tow boats used in connection with the contract barges, because of swift current. The standard barge lines generally make the trip in two weeks.

One outstanding probable effect of the proposed reductions would be a narrowing of the amount of the standard barge-line differential. The present standard barge-line rate from the New Orleans district to St. Louis is 42 cents, which is 80 per cent of the all-rail rate of 50 cents, before adding the surcharge, and the resulting 10-cent differential

is reflected in the joint barge-rail rates from Louisiana origins to points beyond St. Louis, on which rates, incidentally, storage in transit is allowed, which permits distribution by rail from the river cities. Indications are that the differential is much too wide from a competitive-service standpoint, for, as we have seen, the standard barge lines are taking most all of the business. If respondents are allowed to reduce their rates as proposed, the barge lines will consider the publication of rates differentially lower. If the 80-per cent basis were continued, it would reduce the differential from 10 cents to 5 cents. The standard barge rate to St. Louis would become 23 cents and the barge-rail rate to Chicago and other points beyond St. Louis, 25 cents, approximating some of the water rates from New York to Chicago. As already indicated, the traffic manager of one of the principal refiners testified that a differential of about 6 cents would probably afford the respective sets of carriers equality of opportunity with the barge line. Others were silent. There is a suggestion from some protestants that respondents should have approached the standard barge line on the subject of a reduction in the differential without the severe reductions in rates here proposed. But a mere reduction in the differential would not put respondents in any better position than they are now to meet the competition of the water lines from New York and the contract-barge competition from the New Orleans district.

The Mississippi Valley Barge Line calls attention to the percentage divisions that would accrue under the joint barge-rail rates reduced according to the usual differential basis in case the proposed rates are established. On traffic to Peoria, Ill., for instance, the barge line from the New Orleans district would get 60 per cent of the rate, or 15 cents, for its service to Evansville, and the rail line the balance, or 10 cents, for its haul beyond. At present, the barge line gets 26 cents and the rail line 18 cents.

The Mississippi Valley Barge Line, with an invested capital of $3,500,000, operates four power boats and 50 barges on the Mississippi and Ohio Rivers on regular schedule. It began active business only two or three years ago and while it has so far operated at a loss, it appears to be well supported financially and its owners and officials have [fol. 52] hopes of making it a successful venture. Its most important traffic is northbound sugar, which constitutes

about a third of its total tonnage and yields over 40 per cent of its total revenue. The Federal Barge Line is even more of a sugar carrier, sugar constituting about 50 per cent of its northbound traffic. These standard barge lines get most all the sugar traffic, principally because of their 10-cent differential, which the proposed rates, if the 80-per cent basis is continued, would reduce to 5 cents. If the differential is substantially reduced, the standard barge lines will get less sugar, and lower rates on such of it as they do handle. Barge rates, made on the 80-per cent basis, if applied to the tonnage moved by the Federal Barge Line in 1931, would have cost that carrier about $350,000 and wiped out its showing of net revenue. If applied to the reduced volume that it would probably have received under a differential of about 5 cents, they would have cost it much more. The Federal Barge Line sees no good reason for respondents' proposal, but does not protest. Its policy is to let the rail carriers set the rate level. Protestant urges that respondents have conspired in restraint of trade and in violation of the anti-trust law to monopolize the traffic. If respondents succeed, the barge lines will be dealt a staggering blow. Protestant suggests that respondents can much better afford to forego this traffic than can the barge lines. The principal traffic of the barge lines consists of a few commodities moving in a limited territory, while respondents' traffic is general in character and their business resources extensive. Although the sugar traffic in its present volume is almost vital to the existence of the barge lines, it would constitute but a small part of the traffic of respondents. For the 4-year period from 1928 to 1931, inclusive, the ratio of sugar tonnage to total tonnage averaged 1.4 per cent for the Illinois Central, 0.2 per cent for the Louisville and Nashville Railroad Company, and 0.5 per cent for the Southern Railway Company.

The Mississippi Valley Association, a corporate organization of shippers in the Mississippi Valley, opposes the reduced rates particularly on the ground that the existence of the barge lines would be jeopardized thereby and that shippers might ultimately be deprived of water transportation.

The National Sugar Refining Company, with plants at New York rate points, protests the proposed rates with the 80-000-pound minimum. It also protests the establish-

ment of any rates on sugar from Savannah to Chicago that are as low as may be concurrently in effect from New Orleans to Chicago. The haul from Savannah is over 100 miles greater and protestant accordingly suggests the addition of 2.5 cents to the New Orleans rate to make the rate from Savannah. There are no water rates from Savannah to Chicago as low as those from New Orleans and New York to Chicago. The Savannah Sugar Refining Company has long sought a parity with New Orleans and strongly supports respondents' proposal.

The Baltimore Chamber of Commerce opposes the rates with the 80-000-pound minimum because they are lower than the proposed rates from Baltimore. Baltimore and Philadelphia are already suffering from the fact that some of the refining formerly done there is being done at New York because of the water rates.

The eastern rail carriers protest the reduced rates with the 80-000-pound minimum. The canal lines from New York protest all the reductions on the grounds indicated in that part of this report dealing with Investigation and Suspension Docket No. 3829.

The central territory sugar-beet and beet sugar interest protest for the reasons indicated in the last-considered case. They point out how low the proposed rates are from the South in comparison with the present rates from the beet-sugar manufacturing points. To Indianapolis, Ind., for instance, the proposed rate from New Orleans is 30 cents, for a haul of 900 miles, as against the present rate of 25 cents from Bay City, Mich., for a haul of 390 miles. [fol. 53] The eastern carriers refused to concur in the reductions from the South and respondents' proposed rates are therefore not published to apply to local points on the eastern lines. If the schedules were approved, the rate from New Orleans to Terre Haute, Ind., for instance, would be reduced from 56 cents to 30 cents, while to Paris, Ill., a nearby point on eastern lines, a rate of 56 cents would remain. Protestant urges that such disparities would be unduly prejudicial. The contention is not supported by any evidence of injury. No one who might be adversely affected appeared. Respondents would publish properly related rates to destinations on the lines of the eastern carriers, if they could get concurrences. The eastern carriers are now willing to join in the rates with the 60,000-pound minimum.

Rates to western points beyond the destinations considered have not yet been specifically considered by respondents. Certain disparities would therefore result from the establishment of the proposed rates. The rate from New Orleans to Davenport, Iowa, for instance, would be reduced from 62 cents to 30 cents, but that from New Orleans to Des Moines, Iowa, for a similar haul would remain at 65 cents. The Mississippi Valley Barge Line makes a point of this fact, but no one who might be adversely affected is before us. In the time available it was impracticable for respondents to cover all the territory which might be affected by the competitive conditions. Respondents expect to deal with these situations on their merits after our decision herein.

The reduced rates to Chicago and Cincinnati are proposed to be applied also to points intermediate thereto in central Kentucky. The eastern boundary of the zone so affected is, with respect to the rates from the New Orleans district, the line of the Southern from Chattanooga, Tenn., to Cincinnati, and with respect to the rates from Savannah, the line of the Louisville & Nashville from Atlanta, Ga., to Cincinnati. Many reduced rates are proposed to points east of these lines, but the reductions are not as great as those to other points. Protest against this difference in treatment is registered by the Eastern-Southeastern Kentucky Jobbers Association, representing chiefly distributors at Harlan, Hazard, Barboursville, and Middleboro, Ky., and other points on main and branch lines of the Louisville & Nashville, in the coal-mining regions, to which the lesser reductions are proposed. Preservation of the existing relationships as among the various destinations is sought. Protestant's members buy their sugar principally in the New Orleans district and distribute it by truck throughout the territory in their vicinity, largely in competition with jobbers at Louisville, Lexington, and other Kentucky points which would be accorded the Chicago and Cincinnati rates. The present rates to points where protestant's members are located and those to competing points are made on the prescribed basis of 27.5 per cent of first class. From the New Orleans district they range from 53 to 62 cents. Those proposed are generally 36 or 41 cents to the points where protestant's members are located and 30 cents to competing points. From Savannah the present rates are lower to all these points than are those from New

Orleans. To many points where protestant's members are located no reductions are proposed from Savannah although some of the points may be intermediate to the competing points. To Hazard the rate would remain at 54 cents, while that to the competitive points would go down to 30 cents. The points represented by protestant are outside the territory directly affected by the intermediate application of the Chicago and Cincinnati rates. They are [fol. 54] not necessarily entitled to the same reductions as the intermediate points. Moreover, the record is meager. There is no definite evidence that the proposed rates would injure protestant's members. Respondents suggest that the prices paid by protestant's members are probably based on the Savannah price plus the freight selling basis, whereas the prices at the competing points may be dominated by the barge rates to Louisville and that it is possible, therefore, that the changes in relationship that would result from the proposed rates would not have any injurious effect, but might be helpful to protestant's members in meeting competition from Louisville and Lexington.

There can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service. The earnings would compare favorably with those of the eastern lines just considered and would generally accrue from single-line straightaway water-level hauls by economically and efficiently operated carriers in a territory of heavy traffic density. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240 per minimum carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26 cents. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15 cents per car-mile and 6 mills per ton-mile. The traffic considered would be principally added tonnage that could probably be carried at far lower costs. Many commodities are handled by respondents at much lower charges than they here propose for sugar. The record affords ample justification for the proposed rates, minimum 60,000 pounds. We are of opinion, however, that the proposed rates, minimum 80,000 pounds, are somewhat lower than the necessities of the situation require, and our findings so recognize.

We find that respondents have justified the proposed rates with the 60,000-pound minimum. We further find that respondents have not justified the proposed rates with the 80,000-pound minimum, but that they have justified rates 4 cents higher. So far as the 80,000-pound minimum is concerned, this means all-rail rates from New Orleans of 34 cents to Chicago and 32 cents to St. Louis. Under the 80 per cent basis for the standard barge lines, it means a barge-rail rate of 27.5 cents to Chicago and a standard barge rate of 25.5 cents to St. Louis. An order will be entered vacating our order of suspension so far as it relates to rates based on a minimum of 60,000 pounds, requiring the cancellation of the remaining schedules, without prejudice to the establishment of rates in conformity with the foregoing conclusions, and discontinuing this proceeding. Respondents are hereby authorized to effectuate the adjustment herein approved on one day's notice.

Investigation and Suspension Docket No. 3837

By schedules filed to become effective December 6, 1932, and later dates, respondents, to meet barge and barge-truck competition, proposed to reduce their rates on sugar from Louisiana refining points to destinations throughout Arkansas, to southern Missouri, and to certain points in extreme eastern Oklahoma. Upon protest we suspended operation of the schedules until July 6, 1933. Subsequently, upon respondents' petition we vacated our suspension order so far as it affected most all destinations in the southern half of Arkansas, and the proposed rates thereto became effective January 3, 1933. Respondents' petition stated, among other things, that the traffic to the southern Arkansas [fol. 55] points was particularly subject to barge and *and* barge-truck competition and that the proposed rates thereto were immediately desirable to move the winter sugar production.

The suspended schedules contain rates to such points as Joplin and Springfield, in southwestern Missouri, but at the hearing respondents orally withdrew such destinations from the case, for the reason that they had no definite advice that the barge-truck movement thereto was large enough to be worth competing for. There still remain for

consideration rates to points in Southeastern Missouri, the northern half of Arkansas, and eastern Oklahoma.

All-rail sugar traffic from Louisiana points to the destination territory considered fell to a low figure in 1932. There was also a decrease in the tonnage carried by the standard barge lines. The equivalent of perhaps a thousand carloads went by contract barge up the Mississippi, Red, Black, and Ouachita Rivers to such points as Camden and Calion, Ark., at and near the head of navigation, and up the Mississippi River to Helena, Ark., Memphis, and Cape Girardeau, Mo., whence it was distributed by truck into the destination territory mentioned. Respondents seek to attract and hold some of this water-borne traffic.

The present all-rail rates are on the maximum basis prescribed in the southwestern revision, 30 per cent of first class. Respondents propose two sets of reduced rates, one with a minimum of 80,000 pounds and another on a 5-cent higher basis, with a minimum of 36,000 pounds. The rates with the 80,000-pound minimum range generally from about 25 to 40 cents and average nearly 50 per cent below the present level. The following table, compiled from the record, shows distances, present rates, and proposed rates with the 80,000-pound minimum from and to representative points:

From New Orleans To	Distances Miles	Rates	
		Present Cents	Proposed Cents
De Queen, Ark	433	53	27
Bald Knob, Ark	461	60	30
Newport, Ark	467	60	30
Searcy, Ark	471	60	32
Mena, Ark	486	60	32
Batesville, Ark	496	67	35
Fort Smith, Ark	569	60	42
Sikeston, Mo	530	54	30
Cape Girardeau, Mo	564	56	30
Poplar Bluff, Mo	580	56	30
Heavener, Okla	545	60	39

To the northern Arkansas points the proposed rates are on about the same relative level as those to the Southern Arkansas points, which we allowed to become effective in January. The rates with the 36,000 pound minimum are generally about 17.5 per cent; and those with the 80,000-pound minimum generally about 14.5 per cent, of first class, except those to the southeastern Missouri points, which bear a considerably lower percentage relation, and those to the

Oklahoma points, which bear a considerably higher percentage relation to first class. An amount equal to the surcharge is proposed to be reflected in the proposed rates after the surcharge expires.

[fol. 56] The amounts of the proposed rates are based principally on barge-truck combinations via Camden. Before making their proposal respondents investigated the competitive situation and were advised by commercial interests that the contract-barge rate ordinarily charged from the New Orleans district to Camden was 11.3 cents. They also heard of a 10-cent rate to Calion, quoted by a steamboat operator. They received no authentic information as to what these rates included. Protestant Mississippi Valley Barge Line, which contends that the proposed rates are too low, upon investigation could verify nothing lower by water than a rate of 12 cents and that was merely for towage service, the addition of perhaps at least 5 cents being necessary to cover marine insurance, loading, and unloading. There is a suggestion that the figure of 11.3 cents may have been an arbitrary freight selling basis at Camden, not based on transportation charges. Respondents practically admit that the information they received was not very authentic or complete, but insist that considering all the factors, the probable contract-barge rate was below 18 cents. Protestant urges that it must have been higher. According to information gathered by respondents the contract-barge rate from the New Orleans district to Memphis was 19 cents, for a distance about equal to that from New Orleans to Camden under more favorable operating conditions. The contract-barge rate from the New Orleans district to Cape Girardeau was 25 cents. As we understand it, these rates covered only towage. They may be compared with the contract-barge rate of 20 cents to St. Louis, referred to in the above-considered case. The normal truck rates from the river landings apparently range from about 7 to 25 cents according to distance, although some lower rates may have been made to obtain northbound loads for trucks that had been used for the southbound movement of cotton. We are working somewhat in the dark, but if for illustration, we assume an all-inclusive contract-barge rate of 16 or 17 cents to Camden and an average truck rate of 14 or 15 cents beyond, it appears that the proposed rates with the 80,000-pound minimum, which are generally 30 or 32 cents,

on the whole roughly approximate the barge-truck rates. Respondents urge that they should be on about the same level, because the truck rates apply on small quantities from nearby distributing points, whereas the proposed rates would apply on heavy carloads requiring several days for transportation. However, the disadvantages of barge shipment must not be overlooked. As in the above-considered cases, some of the proposed rates, particularly to interior points, are lower than the barge-truck rates, but that is generally due to respondents' observance of the long-and-short-haul rule. For instance, the proposed rate from the New Orleans district to Cape Girardeau, 30 cents, is blanketed southward and inland to Sikeston, Mo. The 30-cent rate as applied to Cape Girardeau may not be any lower than the contract barge rate plus incidental expenses, but applying it to Sikeston leaves nothing to represent the truck haul from Cape Girardeau to Sikeston.

The Mississippi Valley Barge Line concedes that some reductions are necessary to meet contract-barge competition, but it is opposed to any lower basis of rates than 20 per cent of first class. This basis applies throughout Texas and has been adopted by the carriers for general application in the Southwest, but publication of the rates has been held up for some reason pending the decision in this case.

The western trunk-line carriers also urge that the proposed rates are too low. They protest because they are interested in the movement of sugar from beet-sugar manufacturing points in Colorado and Utah to the destination territory in question.

[fol. 57] No reductions are proposed in the standard barge-rail joint rates, because there is no agreement among the parties as to what the rate level or differential should be. The present joint rates are 8 cents lower than the present all-rail rates, the differential representing 20 per cent of the New Orleans-Memphis all-rail rate of 40 cents, without the surcharge, in effect when the joint rates were established. The all-rail rate to Memphis, without the surcharge, is now 25 cents, having been reduced last summer, and on the 20 per cent basis results in a 5-cent differential for the standard barge lines. This latter differential is applied not only on traffic from the New Orleans district to Memphis, but in connection with joint-barge-rail rates from the New Orleans district via Memphis to the Southeast. The Federal Barge Line protests because respondents

have not joined it in reduced rates to the destination territory in question, but it takes no definite position as to the level of the proposed rates, leaving that matter to us. This phase of the case is practically disposed of by the report of March 27, 1933, in Ex Parte Nos. 96, 99, and 102, wherein division 4 dealt with the general subject of reflecting the present prescribed barge-rail differential bases in reduced rates and required the continuance of those bases, except where the interested parties may agree upon other differentials. The order therein becomes effective June 1, 1933.

No reductions are proposed to Oklahoma, except to Heavener and a few other points, where they are incident to the Kansas City Southern Railway Company's conformance to the long-and-short-haul rule in meeting the direct lines' rates to Fort Smith, Ark. The Corporation Commission of Oklahoma and Oklahoma City commercial interests protest. They contend that if reductions are made to western Arkansas points without similar reductions to Oklahoma points, particularly those on and east of the north-and-south line of The Atchison, Topeka and Santa Fe Railway Company, the Arkansas points will have an advantage in distributing sugar and Oklahoma points will suffer undue prejudice. Respondents did not investigate the competitive situation in Oklahoma before making their proposal, but protestants' evidence indicates that sugar is trucked from Camden and Calion into that State just as it is into Arkansas.

Respondents have not convinced us that rates as low as those proposed with an 80,000-pound minimum are necessary, but those with the 36,000-pound minimum appear to be near the correct competitive level. The latter are generally only a few cents lower than rates made 20 per cent of first class and since the carriers have already decided upon that basis for general application in the Southwest, we are of the view that it should be given trial before lower rates are published.

We find that the proposed rates have not been justified, but that rates made 20 per cent of first class, without the surcharge, have been justified, which rates may be established on one day's notice provided the same basis is promptly made general in the Southwest. This means, in part, that rates to points in the southern half of Arkansas, originally suspended but allowed to go into effect, must be canceled. Standard barge-rail rates must be promptly

established on basis of proper differentials in conformity with the last-cited decision. An order will be entered requiring the cancellation of the suspended schedules, without prejudice to the establishment of the rates herein authorized, and discontinuing this proceeding.

[fol. 58] Fourth-Section Application No. 14080 on Reargument

In Transcontinental Eastbound Sugar, 186 I. C. C. 523, division 2 denied transcontinental lines fourth-section authority to reduce their rates on sugar from San Francisco Bay points to Chicago, Milwaukee, St. Louis, and related points in Illinois, and extreme eastern Iowa and Missouri, without reducing their rates to intermediate points. Upon applicants' petition the case has been reargued.

The facts stated in the previous report should be read as part of this report. Suffice it to say here that the present rate from the California points to Chicago, Milwaukee, St. Louis, and the related points and to intermediate points as far west as central Nevada is an 86-cent blanket rate, generally subject to a minimum of 60,000 pounds. Applicants seek to establish a rate of 62 cents, minimum 80,000 pounds, to Chicago and Milwaukee. Such a rate is considered necessary as a competitive measure because of a water rate of about 56 cents from San Francisco Bay points to Chicago available by the Panama Canal, Hudson River, New York State Barge Canal, and Great Lakes, to which rate, for comparative purposes, the applicants add six cents to represent storage, switching, and other services at destination. Applicants seek to establish a rate of 67.5 cents, minimum 80,000 pounds, to St. Louis for the purpose of meeting a water rate of about that amount available the year round by the Panama Canal and Mississippi River. Recognizing the instability of the water rates, the applicants also seek authority to reduce the proposed rates to all the points from time to time as and to the extent that the water lines' rates may be reduced, but do not propose to go below 48 cents. During the past two years most of the California sugar destined to Chicago and St. Louis has moved at the water rates above mentioned, the traffic via New York, however, being confined to sugar in bags. With the opening of the Illinois Waterway, a water rate of about 50 cents is expected

by the applicants this year from the California points to Chicago via New Orleans, and in view of the reductions hereinbefore allowed from New Orleans to St. Louis, there will probably be a substantial reduction in the Mississippi River barge factor of the above 67.5-cent water rate from the California points to St. Louis.

There is no opposition to the application from intermediate points. The eastern and southern carriers, which with the intercoastal steamship lines originally protested it unqualifiedly, have now modified their position to the extent of not opposing reductions that would preserve substantially the present long-standing relationships among origin points, using their own proposed rates from the Atlantic seaboard and Louisiana refining points as a basis. To Chicago, for instance, the usually recognized difference in favor of New Orleans and Baltimore and against the California points is 30 cents. Adding 30 cents to the proposed rate of 39 cents from Baltimore would make the rate from the California points 69 cents. Adding it to the proposed 30-cent rate from New Orleans would make a rate of 60 cents. However, present relationships, in view of the new competitive forces, are no longer worthy of much respect.

The applicants will be granted authority to establish a rate of 65 cents, minimum 80,000 pounds, to Chicago, Milwaukee, St. Louis, and the related points, which rate we find reasonably compensatory, subject to the condition that no rate to points west of Ogden or Salt Lake City, Utah, or Williams or Phoenix, Ariz., shall exceed the rate [fol. 59] established to Chicago, Milwaukee, St. Louis, or the related points. The application is denied so far as it seeks authority to establish rates lower than 65 cents.

An appropriate order will be entered.

Fourth-Section Application No. 14816

By this application, as amended, authority is sought to establish reduced rates on refined sugar, in carloads, from producing points in Colorado, Nebraska, Wyoming, Kansas, Utah, Idaho, Montana, Minnesota, South Dakota, and Iowa to Chicago, Milwaukee, St. Louis, and related points,[2]

[2] In Illinois; southern Wisconsin; the extreme eastern portions of Iowa and Missouri; and western Indiana.

principally in Illinois territory, and to continue the present rates to intermediate points without observing the long-and-short-haul provision of section 4 of the interstate commerce act.

The beet sugar producers in the origin territory, the Public Utilities Commission of Colorado and commercial and agricultural interests in that State support the application. No one opposes the relief sought.

The general basis of rates from the origins here considered to western trunk-line territory is fifth class, minimum 40,000 pounds. Commodity rates, minimum 60,000 pounds, on a much lower basis, where impelled by competition, apply to important consuming centers such as Chicago. The Chicago rate also applies to substantially all points in the intermediate territory east of the Missouri River. The rates to Missouri River cities are slightly lower than fifth class. To intermediate points west thereof they are on the fifth-class basis, subject to the commodity rates to the Missouri River as maxima. The rate from the basic group[a] to representative points in Illinois, St. Louis, and Mississippi River crossings north thereof is 58 cents. The rates to Milwaukee and other points in southern Wisconsin are one or two cents higher. The rates from New York, minimum 60,000 pounds, range from 55 cents to Danville, Ill., and Chicago to 62 cents to the river crossings. The present rates from New Orleans and the proposed rates from that point and eastern refining points to representative points in the destination territory are shown in the above tables.

The reduced rates that applicants wish to establish, herein referred to as proposed rates, are 41 cents, minimum 60,000 pounds, and 32 cents, minimum 80,000 pounds, from the basic group to all of the destination territory. The latter rate reflects a reduction of 26 cents from the present rate, minimum 60,000 pounds. Higher rates related thereto and reflecting similar reductions are proposed from other points on the basis of the following differentials over those shown: From western Colorado, 6.5 cents; from Billings, Chinook, and Sidney, Mont., 5 cents; from Mis-

[a] This group embraces producing points in northern and eastern Colorado, western Nebraska, and southeastern Wyoming.

soula, Mont., 12 cents; and from all points in Idaho and Utah, 13 cents. From McMillan, Idaho, to Chicago for example, the present rate is 71 cents. The proposed rates are 54 and 45 cents, minima 60,000 and 80,000 pounds, respectively. From points that now have rates the same as or lower than those from the basic group the reduced rates from that group would apply as maxima.

[fol. 60] The average distances from producing points in the basic group to Chicago and Burlington, Iowa, are 976 and 784 miles, respectively. The distances from New Orleans to the same points are 919 and 910 miles, respectively. The distance to Chicago from Brighton, Colo., a point in the basic group near Denver, Colo., over the route of the Union Pacific Railroad Company to Council Bluffs, Iowa, and the Chicago and North Western Railway Company beyond, is 1,028 miles. Departures at intermediate points on this route would occur at stations Hurley, Colo., 81 miles, to which the rate is 33 cents, to Low Moor, Iowa, 891 miles from Brighton, to which the proposed rate is 45 cents. The latter rate would be made by combination of the 32 cent rate to Clinton, Iowa, plus the local fifth-class rate from Clinton. This combination basis, which is typical of the rates that would become applicable to such intermediate points, would project itself westward along the line of the Chicago & North Western as far as Cedar Rapids, Iowa, 82 miles west of Clinton, to which point the rate would be 56 cents. The production of sugar in the origin territory approximates about 16,000,000 bags a year. This sugar comes into competition with sugar produced in the South and East, largely at the Missouri River and in the territory east thereof. The State of Illinois consumed 9,524,158 100-pound bags in 1930 and 8,697,405 bags in 1931. As about 50 per cent of its population is in Chicago and its suburbs, it is assumed that one-half of this sugar was consumed there. The consumption in 1931 in the States of Iowa, Kansas, Minnesota, Missouri, Nebraska, North Dakota, and Wisconsin was 15,851,508 bags.

The application is not based upon a loss of traffic already suffered but its purpose is to conserve and safeguard revenue. Sugar carried by roads in the northwestern and central western regions totaled 2,547,295 tons in 1929, 2,624,295 tons in 1930, and 2,602,555 tons in 1931. The total tonnage of sugar originated and handled by the

Union Pacific and the Chicago, Burlington & Quincy, which originate much of the traffic here involved, increased substantially in each successive year during that period.

The origin territory served by applicant carriers is the most important beet-sugar producing area in the United States. As it is a territory of relatively sparse population the important markets for the bulk of the sugar that it produces are in the heavy consuming territory east thereof, particularly that to which the proposed rates would apply. The relationship of the present rates, which have been stabilized over a number of years would be seriously disrupted if the reductions in the rates proposed from the eastern and southern refining points should be made without corresponding reductions in the rates from these beet-sugar producing points. Applicants therefore deem it imperative that this relationship be maintained, particularly because the producers that they serve must rely entirely upon rail transportation to reach the markets where the bulk of their output is sold.

The application refers to a substantial and increasing movement of sugar by unregulated water carriers from the eastern refineries to Chicago and from the Gulf to St. Louis and Ohio and Mississippi River crossings. The rates of those carriers are substantially lower than those of the rail carriers or the regulated barge lines. The evidence as to such water movements and the movement by truck from the river landings to interior points in the destination territory is similar to that introduced by respondents in the investigation and suspension cases.

[fol. 61] Applicants, like those respondents, feel that they are compelled to meet these new and active forms of competition, according to data obtained by them the movement of sugar from the Atlantic seaboard to Chicago by water in 1931 was 21 per cent of the amount consumed in Illinois in that year. Applicants also look with apprehension upon the proposed all-rail rates from the South to the destination territory, which were published prior to the hearing, as constituting a new element of competition, particularly the rates to interior points in the territory.

Applicants feel impelled to establish the proposed rates. They consider the sugar traffic of such importance that they can not take chances on losing it or of a material curtailment in the tonnage because of the direct and collateral

effect upon their revenue, which is derived from the beets and numerous inbound materials to the factories as well as from the sugar tonnage. But they see no necessity for making material reductions in the rates to the intermediate territory, where there is a heavy consumption of sugar. The competition which is met in the destination territory is not present in the same degree in this intermediate territory and applicants point out that if reductions were made in the rates to the latter territory they, as well as the rail carriers from competing sugar refining points, would incur needless losses in revenue. They believe that the losses which they would suffer by such reductions would be so large that they would more than offset the benefit accruing from the proposed rates to the destination territory. In 1931, for example, the movement over the lines of the Union Pacific from Colorado and Utah points to the latter territory was 101,456 tons, yielding gross revenue of $1,202,121. From the same points to the intermediate territory it was 99,293 tons and yielded gross revenue of $1,149,762. The application of the proposed rates as maxima on the latter tonnage would have resulted in a loss in revenue of $479,142. The Chicago, Burlington & Quincy estimated that the revenue reduction on traffic that it handled to the intermediate territory in 1931 would have been $402,000, if it had applied the proposed rates to the destination territory as maxima. The Northern Pacific under similar circumstances would have suffered a revenue reduction on its 1931 tonnage from producing points in Montana to its intermediate territory of $102,000, as compared with a reduction of $18,250 to the destination territory.

The importance of sugar beet production to the welfare and prosperity of Colorado and other sugar beet producing sections in the origin territory; the relative standing of that territory in the production of beet sugar in the United States; and the necessity for marketing the bulk of the sugar there produced in the more populous areas immediately east thereof, including the destination territory, are described at some length in American Sugar Refining Co. v. Chicago, B. & Q. R. Co., 169 I. C. C. 557. The evidence on these points in this case is extensive and goes to emphasize and amplify what was there stated.

Applicants offered a comprehensive study of the cost of handling a carload of sugar, minimum 80,000 pounds, as added traffic in added trains. Assuming that 50 per cent of the average operating expense is applicable to such traffic they estimate this cost on a gross revenue ton basis for a haul of 1,500 miles to be 17 cents per 100 pounds, 9.04 cents per car-mile, 2.26 mills per ton-mile, and $135.64 per car. As the traffic is ordinarily offered a few cars at a time and placed in trains already moving; applicants believe that the added costs are much lower than those shown. The minimum revenue per car under the lowest [fol. 62] of the proposed rates would be $246 under the 41-cent rate, minimum 60,000 pounds, and $256 under the 32-cent rate, minimum 80,000 pounds. The somewhat higher rates, subject to the latter minimum, under the relief authorized, would produce somewhat greater revenue. The evidence warrants the conclusion that the rates which would be established under such authority will be reasonably compensatory.

Applicants will be authorized to establish and maintain from the origin territory to the destinations covered by the appllication rates subject to the 60,000 minimum on the basis described in the application and rates subject to the 80,000 minimum which are 4 cents higher than those described in the application, provided that the higher rates to the intermediate points shall not be increased except as may be authorized by the Commission and shall not exceed the lowest combination of rates subject to the act.

An appropriate order will be entered.

McManamy, Commissioner, concurring in part:

I concur in the findings of the majority in these proceedings except in respect of the granting of fourth-section relief in application No. 14080.

When this matter was before division 2 originally in Transcontinental Eastbound Sugar, 186 I. C. C. 523, applicants proposed to reduce the prevailing carload rate of 84 cents, minimum 60,000 pounds, from San Francisco bay points to Chicago and Milwaukee and related points to 62 cents, and to St. Louis 67.5 cents, subject to a carload minimum weight of 80,000 pounds, and asked for permission to further reduce these rates to as low as 48 cents if further reductions should become necessary to meet the rates of

competing water lines. The application was denied at that time and the report indicates this action was taken because the proposed rates were not considered to be reasonably compensatory. Furthermore, the evidence indicated that on the basis of the 1930 movement and distribution it would be necessary for the applicants to obtain practically all of the sugar moving from the Pacific coast to the destination territory to yield as much gross revenue as they obtained from the traffic they had been able to retain to their lines on the basis of the existing rates. The traffic involved is of vital importance to the water carriers and its diversion to the rail lines which was the purpose of the proposed rates would have been a severe blow to those lines. This denial, therefore, was in line with the policy adopted by us in respect to applications for relief from the provisions of section 4 as announced in Transcontinental Rate cases, 1922, 74 I. C. C. 48 (71).

The rate of 65 cents which the majority now proposes to authorize from San Francisco to Chicago and related points will represent a reduction of 21 cents per 100 pounds in the present rate. It is obvious that in order to enable the applicants to obtain even as much revenue under this rate as they obtain under the present rate it would be necessary to increase their present traffic approximately 30 per cent. This can only occur if competing forms of transportation fail to make corresponding reductions an assumption which in my opinion is not warranted. The net result therefore will be a decrease in revenue of all carriers both rail and water.

[fol. 63] According to the latest figures in evidence they handled during 1931, 41 per cent of the sugar from California to these destinations, or in round figures approximately 59,000 tons, while the water lines handled 59 per cent, or approximately 84,000 tons. Had the rate of 65 cents been in effect in 1931 it would have been necessary for the applicants to handle 53 per cent of the tonnage involved in order to secure the same gross revenue actually received under their current rate, and the proportion handled by the water lines necessarily would have been reduced to less than 50 per cent. This would have left the rail lines in no better position, but undoubtedly would have had a serious effect upon the water lines. There can be no escape from the conclusion that to increase their gross revenues

alone under the proposed reduced rate it will be necessary for the rail lines to obtain an even greater proportion of the tonnage involved and that of the water lines must also be still further reduced. Under Section 500 of the Transportation Act it is declared to be the policy of Congress to promote, encourage, and develop water transportation and to preserve in full vigor both rail and water transportation. I am unable to subscribe to the view that it would be consistent with this clear mandate from the legislative body to give our approval to the establishment of rates by rail that will be so low as to seriously impair, if in fact it may not be destructive of, water transportation in this case.

Furthermore, I am constrained to dissent from the action of the majority by the limitations placed upon our authority in granting relief from the provisions of section 4. That section expressly provides that we "shall not permit the establishment of any charge to or from the more distant points that is not reasonably compensatory for the service performed." The rate of 65 cents which the majority proposes to authorize for a short-line distance of 2,258 miles and for distances over other routes ranging up to 2,890 miles is 21 cents less than the rate of 84 cents plus the emergency increase, which we prescribed as a maximum reasonable rate for hauls of one half or less of the length of those involved herein. Phoenix Chamber of Commerce v. A., T. & S. F. Ry. Co., 140 I. C. C. 171. Consolidated Southwestern cases, 123 I. C. C. 203. In the latter case we prescribed a rate of 65 cents as a maximum reasonable rate on sugar, carloads minimum weight 60,000 pounds, for distances of approximately 740 miles under transportation conditions generally more favorable than those involved in the transportation of the traffic considered herein. The minimum weight in connection with the 65-cent rate authorized herein is 80,000 pounds. Giving due consideration to this difference, I am unable to concede that a rate which we have prescribed as a maximum reasonable rate for hauls not exceeding approximately 750 miles under equal or more favorable transportation conditions can be considered as a reasonably compensatory rate for hauls of from three to four times that distance. It is my view, therefore, that under the limits imposed upon our authority by express provision of law the relief prayed in this application must be denied.

LEE, Commissioner, concurring in part:

I concur in the conclusions of the majority except with respect to the grant of fourth section relief.

Commissioner Tate dissents to the granting of fourth section relief.

Commissioners Eastman and Miller did not participate in the disposition of these cases.

[fol. 64] Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, Held at Its Office in Washington, D. C., on the 3rd day of July, A.D., 1933

Investigation and Suspension Docket No. 3814

Sugar from Gulf and South Atlantic Points

Investigation and Suspension Docket No. 3829

Sugar from Eastern Points to Central Territory

Investigation and Suspension Docket No. 3837

Sugar from New Orleans to Arkansas, Missouri, and Oklahoma

It appearing, That by orders dated September 30, 1932, and subsequently, the commission entered upon hearings concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said orders, and among other things suspended the operation of said schedules so far as they proposed changes in the rates on sugar, in carloads, until May 1, 1933, and later dates;

It further appearing, That the operation of said schedules in Investigation and Suspension Dockets Nos. 3814 and 3829 has been voluntarily deferred by respondents indefinitely; and in Investigation and Suspension Docket No. 3837 until September 6, 1933;

And it further appearing, That a full investigation of the matters and things involved has been had, and that the commission has, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the order heretofore entered in Investigation and Suspension Docket No. 3814, suspending the operation of said schedules in that proceeding, be, and it is hereby, vacated and set aside so far as it relates to rates based on a minimum of 60,000 pounds.

It is further ordered, That the respondents in Investigation and Suspension Docket No. 3814, be, and they are hereby, notified and required to cancel such of their schedules in that proceeding as name rates based on a minimum of 80,000 pounds, on or before September 5, 1933, upon notice to this commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 6 of the interstate commerce act.

It is further ordered, That the order heretofore entered in Investigation and Suspension Docket No. 3829, suspending the operation of said schedules in that proceeding, be, and it is hereby, vacated and set aside.

[fol. 65] It is further ordered, That the respondents in Investigation and Suspension Docket No. 3837 be, and they are hereby, notified and required to cancel said schedules in that proceeding on or before September 5, 1933, upon notice as aforesaid.

And it is further ordered, That these proceedings be discontinued.

Fourth Section Order No. 11300

By fourth-section applications Nos. 14080 and 14816, files by H. G. Toll and E. B. Boyd, Agents, respectively, carriers parties to Agent H. G. Toll's tariffs I. C. C. Nos. 1226 and 1279 and Agent E. B. Boyd's tariff I. C. C. No. A-2747 respectively ask for authority to establish rates on sugar from and to the territory hereinafter described, without observing the long-and-short-haul provision of section 4 of the interstate commerce act. A hearing having been held and full investigation of the matters and things involved therein having been had, and the Commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report and applications are hereby referred to and made a part hereof:

It is ordered, That applicants in No. 14080 be, and they are hereby, authorized to establish and maintain a rate of

65 cents per 100 pounds, for the transportation of sugar, in carloads, minimum weight 80,000 pounds, from San Francisco Bay points to Chicago, Ill., Milwaukee, Wis., St. Louis, Mo., and related points, as set forth in application No. 14080, and to maintain the present higher rates to intermediate points; Provided, That no rate to points west of Ogden or Salt Lake City, Utah, or Williams or Pheonix, Ariz., shall exceed the rate established to Chicago, Ill., Milwaukee, Wis., St. Louis, Mo., or the related points, and shall in no case exceed the lowest combination of rates subject to the interstate commerce act.

It is further ordered, That application in No. 14816 be, and they are hereby, authorized to establish for the transportation of refined sugar, in carloads, from points in Colorado, Nebraska, Wyoming, Kansas, Utah, Idaho, Montana, Minnesota, South Dakota and Iowa to Chicago, Ill., Milwaukee, Wis., St. Louis, Mo., and related points, as described in application No. 14816, rates subject to a minimum carload weight of 60,000 pounds on the basis described in such application, and rates subject to a minimum carload weight of 80,000 pounds which are 4 cents higher than the rates described in the application, and to maintain higher rates to intermediate points; Provided, That the rates to the higher-rated intermediate points shall not be increased except as may be authorized by this Commission and shall in no case exceed the lowest combination of rates subject to the interstate commerce act.

And it is further ordered, That all other and further relief prayed by fourth-section application Nos. 14080 and 14816 be, and the same is hereby, denied.

By the Commission.

George B. McGinty, Secretary. (Seal.)

[fol. 66] Substituted Exhibit "C" to Original and Amended Complaint

SUBSTITUTE EXHIBIT "C" TO AMENDED PETITION

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, Held at Its Office in Washington, D. C., on the 18th day of July, A. D., 1933.

Investigation and Suspension Docket No. 3814

Sugar From Gulf and South Atlantic Points

Investigation and Suspension Docket No. 3829

Sugar From Eastern Points to Central Territory

Investigation and Suspension Docket No. 3837

Sugar From New Orleans to Arkansas, Missouri and Oklahoma

Upon further consideration of the matters and things involved in the above-entitled proceedings and of the order entered therein July 3, 1933, and good cause appearing therefor:

It is ordered, That the said order be, and the same is hereby, amended so as to substitute the following for the 1st, 2nd, 3rd and 4th ordering paragraphs thereof:

It is ordered, That the order heretofore entered in Investigation and Suspension Docket No. 3814, suspending the operation of said schedules in that proceeding, be, and it is hereby, vacated and set aside, effective July 29, 1933, so far as it relates to rates based on a minimum of 60,000 pounds: Provided, That supplements changing the effective date of such schedules shall be made effective not earlier than July 29, 1933, by not less than 5 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the respondents in Investigation and Suspension Docket No. 3814 be, and they are hereby notified and required to cancel such of their schedules in that proceeding as name rates based on a minimum of 80,000 pounds, on or before September 5, 1933, but not

prior to July 29, 1933, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the order heretofore entered in Investigation and Suspension Docket No. 3829, suspending the operation of said schedules in that proceeding be, and it is hereby, vacated and set aside, effective July 29, 1933: Provided, That supplements changing the effective date of such schedules shall be made effective not earlier than July 29, 1933, by not less than 5 days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the respondents in Investigation and Suspension Docket No. 3837 be, and they are hereby, notified and required to cancel said schedules in that proceeding on or before September 5, 1933, but not prior to July 29, 1933, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act.

It is further ordered, That the respondents in Investigation and Suspension Dockets Nos. 3814 and 3837 be, and they are hereby, authorized to establish in lieu of the rates contained in the schedules required to be canceled by the preceeding paragraphs hereof, the rates approved in the report referred to and made a part hereof, upon notice to this Commission and to the general public by not less than five days' filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, but not earlier than July 29, 1933.

By the Commission, Division 2.

George B. McGinty. (Seal.)

[fol. 67] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF UNITED STATES OF AMERICA TO PETITION AND AMENDED PETITION—Filed Aug. 15, 1933

First Defense

United States, one of the defendants in the above-entitled cause, for its First Defense to the petition and

amended petition (hereinafter called the "petition") filed therein against it says:

(1) Petitioner is without legal standing to maintain this suit under Urgent Deficiencies Act (38 Stat. 219; U. S. Code, Tit. 28, Secs. 41-48, inclusive), for the reason, among others, that it has no legal interest in the subject matter of the orders of the Interstate Commerce Commission which it seeks to enjoin and annul.

(2) The petition is without equity on its face, and its allegations disclose no ground sufficient to entitle petitioner to the injunctive processes of this Court.

(3) The petition discloses on its face that there is nothing in the orders of the Interstate Commerce Commission [fol. 68] to which the injunctive processes of this Court can attach, for the reason that said orders merely permit certain tariffs and schedules of rates voluntarily filed with the Commission by numerous common carriers by railroad to become effective, which rates the Commission has found upon evidence to be justified, hence, there is no requirement in the orders which is susceptible of enjoinment.

Second Defense

United States for its Second Defense to the petition and amended petition (hereinafter referred to as the "petition") filed therein against it answers and says:

I

United States admits the allegations of the first two paragraphs, and the first subdivision of paragraph 1 of the petition; but disclaims knowledge of the allegation contained in the second subdivision of said paragraph 1 concerning the reason why petitioner undertook to engage in its present business.

II

United States admits the allegations of paragraphs 2 and 3 of the petition, except that it denies that any specific duty is imposed upon the Interstate Commerce Commission by Section 500 of the Transportation Act, 1920.

III

United States, for answer to paragraph 4 of the petition, admits the allegation contained in the first sentence thereof that on July 3, 1933, and July 21, 1933, the Commission made and rendered its reports and orders, and supplemental reports and orders, in a proceeding entitled "Investigation and Suspension Docket No. 3814" and asso-
[fol. 69] ciated cases, as stated on the first page of said report, which is annexed to the petition as Exhibit B. But United States denies the remaining allegations of said paragraph 4, and denies that they contain a fair, accurate or complete statement of the statements, findings and conclusions of the Commission in its said report, and for a full, complete and accurate statement thereof United States respectfully refers the Court to the full text thereof, annexed as Exhibit B to the petition.

IV

United States denies the allegations contained in paragraphs 5, 6 and 7 of the petition, and denies that the allegations of said paragraphs contain a fair, true, complete or accurate statement of the findings and statements contained in the Commission's report, and respectfully refers the Court to the full text thereof, annexed as Exhibit B to the petition; and, further answering the allegations of said paragraph, United States alleges that they are purely argumentative, speculative and based on petitioner's own construction of and deductions from the Commission's report and orders.

V

United States denies the allegations contained in paragraph 8 of the petition, except that it admits that pursuant to the so-called Denison Act the Commission has heretofore in certain proceedings before it prescribed rates for barge-rail application, upon stated differentials under or lower than all-rail rates for similar traffic.

[fol. 70] VI

United States admits that Section 500, Transportation Act, 1920, contains the provision quoted in paragraph 9 of

the petition, and denies the remaining allegations of said paragraph.

VII

United States denies the allegations contained in paragraph 10 of the petition.

VIII

United States denies the conclusions, matters and things alleged in paragraph 11 of the petition, and alleges that said allegations are argumentative and speculative; that the matters therein mentioned were considered by the Commission, and that said matters are not within the power of this Court to consider.

IX

United States admits the allegations contained in paragraph 12 of the petition.

X

United States denies the allegations contained in paragraph 13, and denies that said orders of the Commission are unlawful or void for any reason therein alleged; except that it admits that Congress enacted the so-called "Inland Waterways Corporation Act," 43 Stat. 360 and 45 Stat. 978, to the full text of which the Court is respectfully referred for a complete and accurate statement concerning the provisions thereof.

XI

United States denies the allegations contained in paragraphs 14, 15, 16 and 17 of the petition, and denies that said orders of the Commission are unlawful or void for [fol. 71] any reasons set forth therein, or for any other reason.

XII

United States denies the allegations contained in paragraph 18 of the petition, and denies that the orders of the Commission are unlawful or void for any reason set forth in said paragraph, or for any other reason; and particularly denies the allegation in said paragraph 18 that

said orders will result in irreparable injury and damage to petitioner, and denies that they will result in any legal injury or damage to petitioner.

XIII

United States, answering paragraph 19 of the petition (as amended) admits that petitioner filed with the Commission the motion described in said paragraph, and admits that said motion (which is annexed before Exhibit A to the amended petition) contained the allegations substantially as set forth in the subdivisions of said paragraph 19; and admits that the Commission denied said motion; but United States denies the remaining allegations of said paragraph 19, and particularly denies that the action of the Commission in denying said motion and refusing to reopen and rehear the proceedings was unreasonable, arbitrary, in abuse of the Commission's discretion or otherwise unlawful; and further denies that the Commission's said orders are unlawful or void by virtue of its refusal to grant said rehearing, or for any other reason alleged or suggested in said paragraph 19.

XIV

United States denies each and every allegation contained [fol. 72] in the first subdivision of paragraph 20 of the petition (as amended), but admits the jurisdictional facts alleged in the second subdivision of said paragraph 20.

XV

Except as herein expressly admitted, United States denies each and every allegation made and contained in the petition, and in each of the several paragraphs thereof.

Further and affirmatively answering the petition, United States admits and alleges that the Interstate Commerce Commission made and rendered the report and the orders sought to be enjoined, that they were made and entered after full hearing of voluminous testimony, that said orders and the conclusions and findings upon which they are based are fully and adequately supported and justified by the evidence, and that in making and entering said orders the Commission acted fully within its statutory authority and did not act arbitrarily, unreasonably or otherwise unlawfully.

Wherefore, having fully answered the petition, United States prays that the relief therein prayed be denied and that said petition be dismissed with costs to the petitioner, and that it have such other and further orders, decrees, or relief as may be just and proper.

(Sig.) Elmer B. Collins, Special Assistant to the Attorney General; Louis H. Breuer, United States Attorney; Harold M. Stephens, Assistant Attorney General.

[fol. 73] *Duly sworn to by Elmer B. Collins. Jurat omitted in printing.*

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERSTATE COMMERCE COMMISSION TO AMENDED PETITION—Filed Aug. 15, 1933

The Interstate Commerce Commission, one of the defendants herein, hereinafter referred to as the Commission, now and at all times hereafter saving and reserving to itself all and all manner of benefit and advantage of exception to the many errors and insufficiencies in the petitioner's amended petition contained, for answer thereto, or unto so much or such parts thereof as it is advised it is material for it to answer, answers and says:

I

Answering the introductory paragraphs and paragraph numbered 1, the Commission admits for the purpose of this suit that the allegations therein contained are true, except that it is without knowledge as to the truth of the allegations in the second subparagraph of paragraph 1 of the reason which prompted the petitioner to undertake its operation and, therefore, if it be material, neither admits nor denies said allegation. Further, it alleges that a copy of [fol. 75] the order of July 18, 1933, is not attached to the petition as alleged.

II

Answering paragraphs numbered 2 and 3, the Commission admits the allegations therein contained, except that with respect to the allegation in paragraph 3 as to its

duties under the Acts of Congress specified, it respectfully refers the Court to said acts, as best defining and determining its duties and functions.

III

Answering paragraphs numbered 4 to 18, inclusive, the Commission admits and alleges that it made and entered its orders dated July 3, 1933, and July 18, 1933, referred to in paragraph 4 of the amended petition in proceedings then pending before it entitled "Investigation and Suspension Docket No. 3814, Sugar from Gulf and South Atlantic Points, Sugar Cases of 1933." That said proceedings were initiated by the Commission upon complaint, without formal pleading, for the purpose of determining the lawfulness of the rates, charges, regulations and practices stated in certain schedules contained in specified tariffs theretofore filed with the said Commission by certain common carriers by railroad subject to the Interstate Commerce Act; that in said proceedings the said carriers parties to said schedules were made parties respondent; that full hearings were had and thereafter the Commission made and entered and served upon all parties to the said proceedings its report of July 3, 1933, and its orders of July 3, 1933, and of July 18, 1933. A copy of said report and of each of said orders are attached to this answer as Exhibits A and B and made a part hereof, and the Commis- [fol. 76] sion respectfully refers the Court to the same for information concerning its findings and requirements in the premises.

The Commission alleges that in said proceedings and prior to the making entering and serving of said report and orders, the parties thereto, including the petitioners herein, were, and each of them was, accorded the full hearing provided for by the Interstate Commerce Act; that in said hearing a large volume of testimony was taken and other evidence bearing upon the matters covered in said report and orders were submitted to the Commission for consideration, including testimony and evidence submitted on behalf of the petitioner herein; that at said hearing and subsequently, both orally and in briefs filed in said proceedings, questions relating to said matters were fully argued and submitted to the Commission for determination on behalf of the parties, including the particular ques-

tions raised by petitioner in this suit, whereupon the Commission determined said matters and entered and served upon all parties to said proceedings, including the petitioner herein, its said report and orders; that said report and orders included the Commission's findings of fact, decision, conclusions, order and requirements in the premises, and that, upon the evidence aforesaid, and as shown in and by said report, the Commission made the findings and stated the conclusions on which the said orders are based.

The Commission further alleges that the findings and conclusions in said report were and are, and that each of them was and is, fully supported and justified by the evidence submitted in said proceedings as aforesaid; that in making said report it considered and weighed carefully, [fol. 77] in the light of its own knowledge and experience each fact, circumstance and condition called to its attention on behalf of the parties to said proceedings, including the matters covered by the allegations of the amended petition herein.

The Commission further alleges that said orders of July 3, 1933, and July 18, 1933, were not made or entered either arbitrarily, or unjustly, or contrary to the relevant evidence, or without evidence to support them; that in making such orders the Commission did not exceed the authority which had been duly conferred upon it, did not ignore or fail or refuse to discharge any duty imposed upon it by any law applicable, did not fail or refuse to give effect to, and did not act or proceed in conflict with any law or mandate of Congress; and the Commission denies each and all the allegations to the contrary contained in the amended petition herein, and it specifically denies the allegations of paragraph numbered 9 of the amended petition that it failed and refused to give effect to the provisions of Section 500 of the Transportation Act, 1920.

Further answering the first subparagraph of paragraph numbered 8 of the amended petition, the Commission admits that in certain proceedings heretofore determined by it, namely Ex Parte No. 96, No. 99 and No. 102 (not No. 103 as specified in the amended petition), it prescribed differentials for barge-rail and rail-barge-rail movement of traffic, generally 20 per cent less than the all-rail rate applicable between the ports served by the barge line in-

volved, but it denies that in its report and orders in the proceedings involved in this suit, it did not give considera-
[fol. 78] tion to the situation of the petitioner and the effect of said orders upon its operations.

Answering the second subparagraph of said paragraph numbered 8, the Commission alleges that the averments thereof as to the action of the rail carriers are immaterial to the issues presented by this suit, namely the validity of the orders of the Commission.

Further answering paragraph numbered 10, the Commission specifically denies the allegations contained in the first subparagraph thereof that the decision and orders of the Commission are without evidence to support them or are beyond the record and that there is no testimony in the record to sustain the finding of the Commission with respect to the cost of barge-line service, and that the Commission erroneously and unlawfully determined said cost.

Answering the second subparagraph of said paragraph 10, the Commission alleges that the allegations therein are argumentative; however, it denies that it made any error or adopted any improper method in arriving at its conclusion and finding that the rates or the level of the rates specified in said subparagraph are compensatory.

Further answering paragraph 11, the Commission alleges that the allegations therein contained consist of arguments and conclusions as to intent and purposes of the rail carriers in proposing the rates considered by the Commission in the proceedings here involved and as to the effect which the petitioner assumes will result from the orders of the Commission entered in said proceedings; that to such allegations it is not required to make answer and it further [fol. 79] alleges that such allegations are immaterial to the issues presented in and by this suit.

Further answering paragraph numbered 12 and the first subparagraph of paragraph numbered 13, the Commission denies that its decision and its orders are in conflict with the provisions of the so-called Anti-Trust Act specified in said paragraph 12.

Further answering the second, third and fourth subparagraphs of paragraph numbered 13, the Commission admits that the Inland Waterways Corporation Act, as amended, the statute referred to in the second subparagraph, contained provisions substantially as set forth and that petitioner, as averred in the third subparagraph, ob-

tained from the Commission a certificate of public convenience and necessity as authorized by said statute; the Commission, however, denies that its decision, report or orders in the proceedings here involved has the effect alleged or operates as a withdrawal or annulment of said certificate; the Commission alleges that that portion of Section 15a of the Interstate Commerce Act, referred to in the fourth subparagraph, has been amended by Section 205 of Title II of the Act of June 16, 1933, Public No. 68, the Emergency Railroad Transportation Act, 1933, and a different rule of rate making has been thereby substituted. It therefore submits that the averments of this subparagraph are immaterial and irrelevant, but the Commission denies that the rates authorized will not be compensatory and alleges that it expressly found that they would be; further, the Commission alleges that the petitioner has not the interest or standing or capacity to raise any question of the insufficiency of revenue accruing to the rail carriers under [fol. 80] the rates proposed by them and authorized by the Commission.

Further answering paragraphs numbered 15, 16 and 17 of the amended petition, the Commission denies that its orders referred to therein result in violation of Sections 2 and 3 of the Interstate Commerce Act; on the contrary it alleges that its orders were authorized by, and were consistent with, the provisions of Section 4 of the Act and with the authority vested in it by said section.

Further answering paragraph numbered 18 of the amended petition, the Commission denies the effect of its orders or the putting into effect of the rates authorized or found justified by the Commission, will be to cause irreparable damage and legal injury to petitioner for which it may have remedy in the courts; it further denies that the effect of the orders of the Commission is or will be to take or confiscate petitioner's property. The Commission further alleges that the said tariffs and rates became operative and went into effect on July 29, 1933, as to those rates in which a minimum of 60,000 pounds was specified, and on July 31, 1933, as to those based on a minimum of 80,000 pounds.

IV

Answering paragraph numbered 19 of the amended petition, the Commission admits the filing by the petitioner of

the motion for rehearing, reargument and modification specified in said paragraph and refers the Court to the copy thereof filed with the amended petition for full and precise information as to the statements and showing made therein. The Commission admits that it overruled said motion by order dated July 31, 1933, not August 3, 1933, [fol. 81] as stated in the amended petition.

The Commission denies that its action in overruling said motion was a denial of any right of petitioner and denies that its action was unlawful or invalid or constituted a denial of a fair hearing or constituted arbitrary action. On the contrary it alleges that its action was a proper and valid exercise of its administrative authority.

Further answering said paragraph, the Commission alleges that the petitioner was guilty of laches in the filing of the said motion, particularly in so far as it related to changed conditions, in that it failed to file the same and to call the Commission's attention to said alleged changed conditions until after the report and orders of the Commission involved herein were made, entered and issued; that having failed so to do, and having thus speculated upon the character and effect of the report and orders which would be issued, it cannot be heard to complain of the Commission's action on said motion.

In further answer to said paragraph, the Commission alleges that said motion was not received by it or filed with it until July 28, 1933; that prior thereto, to-wit, on July 27, 1933, the petitioner filed in this Court its petition in this cause seeking a decree setting aside and annulling said orders of the Commission; that in and by the institution of this suit as aforesaid, the petitioner elected to proceed in Court to obtain such relief as it deemed itself entitled to and it is thereby estopped from now asserting that the Commission ought to have allowed or granted said motion. Further, the Commission alleges that its action in overrul- [fol. 82] ing the said motion was fully justified by reason of the institution of this suit by petitioner, in addition to the other reasons already set forth.

Further answering the said paragraph, the Commission admits that it refused to change or extend the effective date for the rates involved, but alleges that said refusal was within its administrative discretion and was not arbitrary and violated no right of petitioner.

Answering the last subparagraph of said paragraph numbered 19, the Commission denies that petitioner used due diligence to prevent the said rates going into effect.

V

Answering the first subparagraph of paragraph numbered 20 of the amended petition, the Commission denies that its orders, or either of them, are erroneous, unlawful, invalid, inconsistent, arbitrary or without substantial evidence to support them, or either of them, or in violation of any law, for the reasons or in the particulars specified in said paragraphs, or for any other reasons or in any other particulars whatsoever.

Answering the second subparagraph of said paragraph 20, the Commission admits that the venue of this suit is properly laid.

VI

The Commission further alleges, as shown in its said report, there were considered in said report other proceedings as specified therein; that said orders of July 3, 1933, and July 18, 1933, were directed to said other proceedings as well as to the proceeding designated "Investigation [fol. 83] and Suspension Docket No. 3814;" that from the main allegations of the amended petition it would appear that petitioner attacks and seeks relief in respect of the orders in so far as they relate to Investigation and Suspension Docket No. 3814, but from other allegations the Commission is uncertain whether petitioner complains of and seeks relief in respect to said other proceedings and of the part or parts of the orders which were directed to these proceedings, but, nevertheless, the Commission makes the same averments and allegations and denials in respect to each of these proceedings and of the part or parts of the orders affecting them as is made with respect to proceeding No. 3814, and of the part or parts of the order affecting said proceeding, and it further particularly and by reference as if fully set forth here, makes applicable to said other proceedings and other part or parts of said orders the allegations, averments and contents of paragraph III of this answer, in respect of the granting of a full hearing, the participation of petitioner therein, the regularity of the proceedings before the Commission, the conformity to and application by the Commission of the law relating to the

subject matters, and the existence of substantial evidence to support the findings of the Commission.

Except as herein expressly admitted, the Commission denies the truth of each of and all the allegations contained in the amended petition in so far as they conflict either with the allegations herein, or with either the statements or conclusions of fact included in its said report of July 3, 1933, and its orders of July 3, 1933, and July 18, 1933, which re-
[fol. 84] port and orders are hereby referred to and made a part hereof.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and it hereby prays that said amended petition be dismissed.

VII

For a further and separate defense to said amended petition, the Commission alleges that the petitioner is without interest, standing or capacity to institute or maintain this suit, for that the orders of the Commission complained of by petitioner neither required nor compel any action by the petitioner; that said orders authorize and find justified all rail rates proposed by rail carriers; that said rates do not apply to traffic over petitioner's lines, and that petitioner's complaint is as to an alleged impairment of its status as a competitor of the rail carriers; that such impairment if it be established, does not and would not constitute a legal injury or one which would enable or entitle it to bring this suit.

Wherefore, the Commission moves the Court to dismiss said amended petition.

Interstate Commerce Commission, Daniel W. Knowlton, Chief Counsel; H. L. Underwood, Attorney.

[fol. 85] *Duly sworn to by Balthasar H. Meyer. Jurat omitted in printing.*

[fol. 86] IN UNITED STATES DISTRICT COURT

[Title omitted]

INTERVENTION OF THE ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY; CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY AND NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY—Filed Aug. 15, 1933

To the Honorable Judges of the Said Court:

In accordance with the provisions of Section 212 of the Judicial Code (U. S. C. A. Title 28, Sec. 47, Subd. (27), Note), we hereby enter the appearance of the Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company and New Orleans and Northeastern Railroad Company, as interveners, and of ourselves as their counsel in the above entitled cause, each one of which railroad companies was a party in interest to the proceeding before the Interstate Commerce Commission, known as I. & S. Docket No. 3814, Sugar From Gulf and South Atlantic Points.

(Sgd.) H. L. Walker, Elmer A. Smith.

[fol. 87] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF INTERVENERS ILLINOIS CENTRAL RAILROAD COMPANY, LOUISVILLE AND NASHVILLE RAILROAD COMPANY, SOUTHERN RAILWAY COMPANY; CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY; THE ALABAMA GREAT SOUTHERN RAILROAD COMPANY AND NEW ORLEANS AND NORTHEASTERN RAILROAD COMPANY, TO THE AMENDED COMPLAINT—Filed Aug. 15, 1933

The above named interveners in the above-entitled suit, reserving to themselves and to each of them all manner of

benefit and advantage of exception to the many errors and insufficiencies in the amended petition, for answer thereunto, or unto so much or such parts thereof as they are advised it is material for them to answer state:

I

Interveners admit the allegations of the second paragraph of the amended petition and admit that the Interstate Commerce Commission made a report and entered orders as shown in Exhibits "B" and "C" attached to the amended complaint.

II

Interveners admit the allegations contained in the first paragraph of Section 1, the allegations contained in Section 2, and the allegations contained in Section 3, except that interveners deny that the Interstate Commerce Commission is specifically charged with the administration and enforcement of Section 500 of the Transportation Act of 1920.

III

Interveners in answer to the allegations in Section 4 admit that the Interstate Commerce Commission on July 3, [fol. 88] 1933 and on July 18, 1933 entered orders in a proceeding known as I. & S. Docket No. 3814 and associated cases and that in said orders the Commission referred to and made a part thereof its report in said cases, and state that copies of said orders and report are attached to the amended petition and marked Exhibits "B" and "C". Interveners refer to the said report as to what the Commission therein said and found.

IV

Interveners deny each and all of the allegations contained in Section 5 of the amended petition.

V

Interveners in answer to the allegations contained in Sections 6 and 7 state that the report of the Interstate Commerce Commission attached to the amended complaint and marked Exhibit "B" shows what findings were made

by the Commission and what rates the Commission found justified.

VI

Interveners deny that the Commission approved a rate for all-rail service from 1 cent to 11 cents lower than the total cost to the sugar refiner of a barge-truck movement as alleged in Section 7.

VII

Interveners deny that the Commission has not given effect or consideration to any damage and detriment that may accrue to the barge line movement of sugar by reason of the rates which the Commission found the carriers had justified in the said proceeding known as I. & S. Docket No. 3814, and state that the Mississippi Valley Barge Line Company has no vested right to the traffic in sugar or in any other traffic.

Interveners deny that they have entered upon a policy to eliminate water transportation as averred in the second paragraph of Section 8 and state that such reductions as they have made in the rates on the commodities enumerated [fol. 89] in said second paragraph have been made to meet the competition of other agencies of transportation, including barge lines and trucks, and to prevent the total destruction and loss of interveners' traffic.

Interveners state that they have a right under the law to reduce their rates to meet the competition of other agencies of transportation provided only that such reduced rates do not violate the Interstate Commerce Act. They further state that such reduced rates as they have made to meet the competition of other agencies of transportation are not in violation of the Interstate Commerce Act.

VIII

Interveners admit that Section 500 of the Transportation Act of 1920 reads as set out in Section 9, but they deny each and all of the other allegations contained in said section.

IX

Interveners deny that the said report and order of the Commission is without evidence to support the same and beyond the record in the respects stated in the first para-

graph of Section 10 or in any other respects, and deny that the Commission erred as stated in said Section 10 or that the result reached by it is erroneous and unlawful, and deny the allegation that there is no testimony in the record to justify the Commission's findings.

They further deny that the Commission in making the comparison referred to in the second paragraph of said Section 10 gave consideration to the system costs of one rail line alone and deny that the finding of the Commission respecting the compensatory character of the rates which the Commission found justified was arrived at by erroneous calculations.

Further answering Section 10 these interveners state that the report and order of the Commission are supported and sustained by the evidence before the Commission in said proceeding known as I. & S. Docket No. 3814.

[fol. 90] X

Interveners admit the allegation in the first paragraph of Section 11 that they proposed a rate of 28 cents from New Orleans, Louisiana, to St. Louis, Missouri, to enable them to meet the competitive situation incident to water transportation.

Interveners deny that at the time of the filing of the tariffs and at the present time the going rate incident to port-to-port movement by certificated barge lines from New Orleans, Louisiana, to St. Louis, Missouri, was from 37 cents to 42 cents per 100 pounds and state that according to their best information one or more certificated barge lines transported sugar in substantial volume at rates substantially less than the said rates.

Interveners deny that their purpose in proposing reduced rates was to cripple or eliminate certificated barge lines operating on the Mississippi and Ohio rivers and their tributaries. Interveners state that their purpose in proposing to reduce rates was to give their all-rail routes from New Orleans, Louisiana, to points in the North an equality of opportunity with competing water routes and to enable interveners to handle by their all-rail routes from New Orleans, Louisiana, a fair share of the sugar traffic originating at that point, that the adjustment of rates that had been in effect had denied to the all-rail routes of interveners an equality of opportunity with competing routes and had

resulted in the diversion from the all-rail routes of petitioners to competing barge and truck routes of an enormous tonnage in sugar, that as found by the Interstate Commerce Commission in its report in I. & S. Docket No. 3814, the rail lines operating out of New Orleans, Louisiana, to points in the North are hauling practically no sugar, and that in 1932 the barge movement of sugar amounted to over 500,000 tons or about ten times as much as moved all rail from Louisiana points to the same territory.

[fol. 91] Further answering interveners deny the allegation in the second paragraph of Section 11 that the rate to St. Louis, Missouri, is typical of the character of rates that were proposed by them in said I. & S. Docket No. 3814 and of the particular intent and purpose that the rail carriers had in proposing said rates.

Interveners deny that the Commission has allowed the rail carriers to carry out and put into execution and effect their purpose of eliminating certificated barge line movements.

Further answering interveners deny the allegation in the third paragraph of Section 11 that the contract barge line operators and operations have disappeared from the picture since the hearing before the Commission, with the exception of one particular line, and deny that the rates approved by the Commission will be to meet alone a competitive situation as presented by the certificated barge lines, including that of the barge line of petitioner, and deny that the rates approved or designated to St. Louis, Missouri, could have but one result and that is the elimination of the entire sugar tonnage from the water-borne service.

Further answering interveners deny that the Commission by its order is permitting and allowing a positive effort on the part of rail carriers to eliminate water competition, but aver that the Commission has found certain rates not unlawful which in the judgment of interveners will give their all-rail routes an equality of opportunity with competing water routes, an equality which the adjustment of rates formerly in effect denied to interveners and will give interveners a fair share of the sugar traffic, and that there is no provision in the law that support the contention of petitioner that the barge lines are as a matter of right entitled to transport substantially all the sugar traffic from New Orleans, Louisiana, to the exclusion of the rail carriers.

[fol. 92]

XI

Interveners in answer to Section 12 state that the statutes therein referred to declare what is unlawful under said statutes.

XII

Interveners deny each and all the allegations in the first paragraph of Section 13 and particularly deny that the rates proposed and designated by the Commission will restrain commerce between the various States or tend thereto, deny that the Commission in its report recognizes the fact that the rates found justified by the Commission will have the effect of restraining commerce between the various States or will tend thereto, and deny that an attorney for one of the rail carriers at the oral argument in I. & S. Docket 3814 stated to the Commission that it was the intent and purpose of the proposed rates to cripple or entirely eliminate water transportation, and deny that this is the result of the rates found justified by the Commission.

Further answering interveners deny that the report of the Commission is in direct conflict with statutory enactment.

Interveners in answer to the second paragraph of Section 13 state that the act of Congress therein cited shows what provisions it contains.

Interveners in answer to the third paragraph of Section 13 admit that petitioner obtained a certificate of public convenience and necessity from the Interstate Commerce Commission under the order of said Commission of July 11, 1930, issued in a proceeding known as Ex Parte No. 99, Application of Mississippi Valley Barge Line Company, 167 I. C. C. 41. But interveners state that the said certificate did not render petitioner and its operations immune from competition or make it unlawful for a rail carrier to compete with petitioner.

[fol. 93] Interveners further deny that the effect of the order of the Commission in I. & S. Docket No. 3814 and associated cases is to remove the petitioner as a water carrier from the Mississippi River and its tributaries and to withdraw and cancel for all practical purposes the certificate issued by the said Commission in the said proceeding.

Further answering interveners deny that under the decision of the Commission in I. & S. Docket No. 3814 and

associated cases the Commission admits that it is improbable that the rail carriers by the rates proposed or designated can or will recapture the sugar tonnage in sufficient amount to compensate for the losses they will sustain under the present movement and under the present rates. Interveners state that their purpose in proposing the rates on sugar considered by the Commission in I. & S. Docket No. 3814 was not only to regain some part of the sugar traffic that they had lost in the past few years to competing agencies of transportation because of the lack of any fair competitive relationship between their all-rail rates and the rates of their competitors, but to prevent any further losses in their traffic, that as found by the Commission in the report the interveners were willing to make these reductions rather than run the risk of further losses in their sugar traffic which the continued maintenance of existing rates might entail.

Interveners further answering the fourth paragraph of Section 13 state that the act of Congress therein referred to, Section 15a of the Interstate Commerce Act, was amended by the act of Congress entitled "Emergency Railroad Transportation Act, 1933," approved June 16, 1933.

Interveners deny that the report of the Commission in I. & S. Docket No. 3814 is contrary to and in violation of the express mandate of Congress that relates to matters within the jurisdiction of the Interstate Commerce Commission.

[fol. 94]

XIV

Interveners in answer to the allegations contained in Section 14 state that the report of the Commission in I. & S. Docket No. 3814 and associated cases shows what the Commission decided and determined in connection therewith and the orders that it entered, the report and orders being attached to and made a part of the amended petition.

XV

Interveners deny the allegation contained in Section 15 that the order of the Commission results in discrimination and in undue preference and prejudice in violation of Sections 2 and 3 of the Interstate Commerce Act, and deny that the Commission in its report recognizes these violations of the Act and makes no defense for said situation.

XVI

Interveners deny that the disparity between the rates referrred to in Section 16 creates violations of the Interstate Commerce Act and deny the allegation in said section that for the reasons stated in said section the order of the Commission results in a violation of Sections 2 and 3 of the Interstate Commerce Act and is therefore illegal, unlawful and void.

Interveners further answering Sections 14, 15 and 16 state that not all discriminations and preferences are unjust and unlawful but only those that are undue, that whether in any case the discrimination or preference is undue is a question of fact, that the duty of determining this question of fact in any case is imposed by the Interstate Commerce Act upon the Interstate Commerce Commission and that said Commission in its report in I. & S. Docket No. 3814 found that there was no unjust discrimination or undue preference in the rates which it found that the rail carriers had justified.

[fol. 95] XVII

Interveners deny that the rates which the Interstate Commerce Commission found the rail carriers had justified will result in a violation of the fourth section of the Interstate Commerce Act as alleged in Section 17, and in further answer to said section state that such departures from the fourth section as exist in the rates from New Orleans, Louisiana, which the Commission found the rail carriers had justified, are all protected by Fourth Section Order No. 7542, issued by said Commission.

XVIII

Interveners deny the allegation in the first paragraph of Section 18 ~~that~~ the rates which the Interstate Commerce Commission found the rail carriers had justified will result in the crippling or entire elimination of petitioners' business.

Interveners further answering said first paragraph of said Section 18 state that it is their expectation and hope that the rates which the Commission found justified will give interveners a fair share of the sugar traffic originating in New Orleans, Louisiana, and that if the rail lines, includ-

ing the lines of interveners serving New Orleans, Louisiana, obtain a fair share of the sugar traffic originated at that point, it will necessarily result in the diversion from competing barge lines, including the petitioner, or some part of the sugar traffic that they have been handling, but that as found by the Commission in its report in I. & S. Docket No. 3814, the rail carriers reaching New Orleans, Louisiana, having been handling by their all-rail routes from New Orleans, Louisiana, only about one-tenth of the volume of sugar transported from New Orleans, Louisiana, by the barge lines, that this division of the sugar tonnage does not reflect a fair division of the tonnage and does not give the all-rail routes a fair share of the sugar traffic, and that [fol. 96] the rail carriers, including interveners, have the right under the Interstate Commerce Act to establish rates that are in conformity with that Act and that will give them a fair share of the traffic.

Interveners in answer to the second paragraph of Section 18 state that the report and order of the Commission in I. & S. Docket No. 3814, Exhibits "B" and "C" attached to the amended petition, show just what findings the Commission made.

Interveners deny that the rates which the Commission therein found justified will result in damage and in irreparable injury to petitioner.

Interveners deny that the rates found justified by the Commission in its order will produce the result as stated in Paragraph 3 of Section 18.

Further answering the third paragraph of said section interveners state that the order of the Commission does not require petitioner to accept and transport sugar, that it does not require petitioner to establish its port-to-port rates or its joint rates with rail carriers on a fixed or definite relationship with the all-rail rates which the Commission found justified in its report in I. & S. Docket No. 3814.

Interveners further state that the petitioner has no legal right to complain of the all-rail rates which are lawful rates under the standards laid down by the Interstate Commerce Act, and that all-rail rates which are lawful rates under such standards cannot be said as a matter of law to confiscate the property of petitioner.

XIX

Interveners admit in answer to the allegations contained in Section 19 that petitioner filed with the Interstate Commerce Commission a Motion for Rehearing, a copy of which [fol. 97] Motion is attached to the amended petition, and that said Motion for Rehearing was overruled by the Commission.

Interveners deny that the competition of contract barge lines has entirely disappeared since the hearing in I. & S. Docket No. 3814, with the exception of one particular line, deny that the particular competition which was described by interveners at the hearing in I. & S. Docket No. 3814 was entirely changed and that the record before the Commission is stale, deny that the particular costs testified to before the Commission with respect to water-borne tonnage and the costs at the present time are entirely different, and deny that the denial by the Commission of petitioner's Motion for Rehearing was a denial of a right guaranteed by law.

Further answering Section 19 interveners deny that the National Recovery Act has resulted in any change in conditions from those that existed at the time I. & S. Docket No. 3814 was heard before the Commission, deny that there has been any co-ordination of various forms of transportation, deny that the rates found justified by the Commission in I. & S. Docket No. 3814, will result in a loss to the rail carriers of the United States in the approximate sum of $10,000,000.00 per year, and state that the allegations in the first and second paragraphs of said Section 19 with respect to the National Industrial Recovery Act deal solely with conditions which may or may not exist at some future time.

Further answering Section 19 interveners deny that the only transportation agencies that have been handling substantial tonnages of sugar from the Gulf ports to St. Louis, Missouri, are the certificated barge lines, and deny that the rates charged by all the certificated barge lines on port-to-port movements from New Orleans, Louisiana, to St. Louis, Missouri, are from 37 to 42 cents; but state that the rates charged by at least one line range from 20 to 24 cents. [fol. 98] Interveners deny that the particular rates found justified by the Interstate Commerce Commission are far below the out-of-pocket cost incident to the movement of sugar by water from the Gulf to Ohio and Mississippi river

ports, and deny that under the rates designated by the Commission water transportation cannot continue as a profitable venture.

Interveners deny that a radically different situation had supervened since the date of the hearing in I. & S. Docket No. 3814 before the Commission, and deny that there was any change in conditions that made it mandatory upon the Commission to grant petitioner's Motion for Rehearing, and deny that the action of the Commission in denying petitioner's Motion for Rehearing was unlawful and that the order of the Commission is invalid.

XX

Interveners deny each and all of the allegations contained in Section 20.

XXI

Interveners further answering the amended petition herein allege that the findings and conclusions of the Interstate Commerce Commission were and are and that each of them was and is fully supported and justified by the evidence before the Commission and allege that the said order was not made or entered by the Commission either arbitrarily or unjustly or contrary to the relevant evidence or without evidence to support it, that the order is not in violation of any act of Congress and that in making said order the Commission did not exceed the authority which had been duly conferred upon it by the Interstate Commerce Act, or exercise that authority in an unreasonable manner.

XXII

Interveners further answering the amended petition allege that the order of the Commission in I. & S. Docket No. 3814, averred by petitioner to be void, subjected pe- [fol. 99] titioner to no legal injury, that petitioner has no legal right or interest that has been or will be injuriously affected by the said order, and the petitioner, therefore, has no right to institute and maintain this suit.

XXIII

Interveners further answering the amended petition allege that the order of the Commission is not such an order

as may be judicially reviewed by any court and that for the court to take jurisdiction of this proceeding would be tantamount to usurpation by the court of the functions of the Commission.

XXIV

Interveners further answering the amended petition allege that the order of the Commisison in I. & S. Docket No. 3814 required interveners to publish no rates whatever, that the order required interveners to cancel proposed rates based upon a minimum weight of 80,000 pounds which had never taken effect, that the cause has therefore become moot and that a judgment in favor of petitioner would be futile, that if the Commission's order were set aside the rail carriers would still be free to publish rates at least no lower than those found justified by the Commission in its report in I. & S. Docket No. 3814 and associated cases, subject, of course, to the power of the Commission under Section 15 (7) of the Interstate Commerce Act to suspend those rates.

Interveners deny that petitioner is entitled to the relief sought or to any part thereof and pray that the petition be dismissed.

Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company; Cincinnati, New Orleans and Texas Pacific Railway Company; the Alabama Great Southern Railroad Company and New Orleans and Northeastern Railroad Company, by H. L. Walker, Elmer A. Smith, Their Attorneys.

[fol. 100] *Duly sworn to by C. C. Cameron. Jurat omitted in printing.*

[fol. 101] In United States District Court.

[Title omitted]

Supplemental Petition—Filed Aug. 15, 1933

Your Petitioner by leave of Court, first had and by reason of entry of appearance, on August 15, 1933, of the following named rail carriers as defendants, to-wit: Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, the Ala-

bama Great Southern Railroad Company and New Orleans and North Eastern Railroad Company.

Your Petitioner prays this Honorable Court to adjudge, order and decree that said defendants rail carriers and each of them shall be perpetually enjoined from assessing, collecting or charging rates on sugar in carloads from New Orleans, La.; Mobile, Ala.; Pensacola, Fla.; and Port Chalmette, La., to destination in Illinois, Indiana, Iowa, Kentucky, Missouri, Ohio, Tennessee, and Wisconsin, which rates were published in Agent Emerson's tariff No. 1-H, I. C. C. 156 and Supplement 48, 10-B I. C. C. 165 and which carry the rates involved in this proceeding, and which rates were considered and approved or considered and specific rates designated by the Interstate Commerce Commission, as specified rates for application by rail carriers, which [fol. 102] particular rates are involved in the decision and orders of the Interstate Commerce Commission in its Docket I. & S. 3814.

Thompson, Mitchell, Thompson and Young by J. R. Van Slyke, Attorneys for Mississippi Barge Line Company.

[fol. 103] In United States District Court for the Eastern Division of the Eastern Judicial District of Missouri

In Equity. No. 10496

Mississippi Valley Barge Line Company, a Corporation, Petitioner,

vs.

The United States of America and The Interstate Commerce Commission, Defendants, and Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, and New Orleans and Northeastern Railroad Company, Interveners

Decision

Memorandum Opinion—Filed Oct. 13, 1933.

This cause came on to be heard at St. Paul, Minnesota, on the 15th day of August, 1933, before a Court consisting

of John B. Sanborn, Circuit Judge, Charles B. Faris, District Judge, and Charles B. Davis, District Judge, upon the application of the petitioner for an injunction.

The petitioner was represented by Mr. James R. Van Slyke, Mr. Samuel A. Mitchell, and Mr. H. L. Harvey (Messrs. Thompson, Mitchell, Thompson & Young were with them on the brief).

The United States was represented by Mr. Elmer B. Collins, Special Assistant to the Attorney General (Mr. Harold M. Stephens, Assistant Attorney General, and Mr. Louis H. Breuer, United States Attorney, were with him on the brief).

The Interstate Commerce Commission was represented by Mr. H. L. Underwood (Mr. Daniel W. Knowlton was with him on the brief).

The interveners were represented by Mr. Horace L. Walker and Mr. Elmer A. Smith.

While the application of the petitioner was for a preliminary injunction, it was agreed by all parties that the suit should be finally determined by the Court upon the record at the hearing.

[fol. 104] The suit is brought by the petitioner against the United States and the Interstate Commerce Commission to enjoin orders of the Commission issued on July 3, 1933, and amended July 18, 1933, in a proceeding entitled "Investigation and Suspension Docket No. 3814, Sugar from Gulf and South Atlantic Points, Sugar Cases of 1933." 194 I. C. C. —.

The facts out of which this controversy arises are, in substance, these:

The petitioner operates as a common carrier by water between New Orleans, Louisiana, and northern points on the Mississippi and Ohio Rivers including St. Louis and Cincinnati. It has a certificate of convenience and necessity from the Interstate Commerce Commission, and it has joined with rail carriers in establishing through routes and joint rates. Its port-to-port rates are, of course, not subject to regulation by the Commission.

Due to the difference in rates charged by the petitioner and other barge lines and those formerly charged by the competing rail carriers, the business of transporting refined sugar from points adjacent to the lower Mississippi River was diverted from the rail carriers. In order to recover

this business the competing rail carriers jointly proposed new schedules of reduced rates on sugar from New Orleans to northern points, and, in accordance with Section 6 of the Interstate Commerce Act, filed with the Commission schedules of such rates to become effective October 1, 1932. These schedules established two different sets of rates, one based upon a minimum weight of 60,000 pounds per car, and the other based upon a minimum weight of 80,000 pounds per car. To illustrate the effect of the proposed change: the old rate to Chicago from New Orleans was 56¢ a hundred pounds, and under the proposed new rates the charge was 39¢ a hundred pounds on the lesser minimum per car, and 30¢ a hundred pounds on the greater.

The Interstate Commerce Commission, under Section 15(7) of the Interstate Commerce Act, suspended these rates pending investigation. Protests against the proposed rates were filed by the petitioner and others. After a full hearing and investigation the Commission issued its orders of July 3, 1933, and its amended orders of July 18, 1933. Thereby the Commission approved the proposed rates in so far as they were based upon the 60,000 pound minimum, but did not approve the rates based upon the 80,000 pound minimum, which it found were lower than the necessities of the situation required, and ordered a cancellation of the schedules to that extent. It observed, however, that the circumstances justified a rate on the 80,000 pound minimum four cents higher than that proposed by the railroads, and the railroads were invited to publish and to make effective such rates. Thereupon the railroads did publish and file changed schedules in accordance with the suggestion of the Commission, and such rates became effective.

The petitioner filed with the Commission a motion for a rehearing upon the grounds of changed economic conditions and the alleged failure of the Commission to give effect to the Congressional mandate of Section 500 of the Transportation Act of 1920 (U. S. C., Title 49, Par. 142), which is [fol. 105] directed toward the encouragement of water transportation. This motion was denied. This suit to enjoin the enforcement of the orders in so far as they affect rates from New Orleans followed. It is brought under U. S. C., Title 28, Par. 41(28), and is directed against the Commission and the United States in accordance with the provisions of U. S. C., Title 28, Par. 46.

The petitioner complains of the Commission's orders for the following reasons:

(1) The Commission ignored the policy of Congress as stated in the Transportation Act.

(2) Its decision is unsupported by the evidence and by its findings.

(3) The Commission by its orders has permitted a combination in restraint of trade, which is contrary to the spirit of the Anti-Trust Laws.

(4) The proposed rates will result in irreparable injury and damage to the petitioner.

(5) The orders are arbitrary, discriminatory and unduly preferential in violation of Sections 2 and 3 of the Interstate Commerce Act. (U. S. C., Title 49, Pars. 2, 3.)

(6) The denial by the Commission of the petitioner's application for a rehearing amounted to a denial of a fair hearing.

The United States has moved to dismiss the petition on the ground that the petitioner has no standing in Court because it lacks a sufficient interest in the subject matter of the suit; that the Commission's orders are negative in form and substance and are not such orders as can be enjoined; that the petitioner's bill is without equity and discloses no grounds which entitle the petitioner to an injunction.

The Interstate Commerce Commission asserts that its findings were fully supported by the evidence submitted to it, that it acted contrary to no law or mandate of Congress, and that the petitioner has no such interest in the rates established or permitted by the orders as to enable him to maintain this suit.

The questions presented, then, are substantially these:

1. Has the petitioner such an interest in the subject matter of the suit as entitles him to maintain it?

2. Are the orders of the Commission such as may be enjoined?

3. Do the orders of the Commission sanction a violation of the Anti-Trust Laws and are they for that reason void?

4. In view of the findings of the Commission and of the Congressional policy announced by the Transportation Act, are the orders complained of arbitrary and unduly discriminatory?

[fol. 106] 5. Was the petitioner denied a fair hearing?

In view of the conclusions which we have reached as to the third, fourth and fifth questions, we feel that it is unnecessary to decide whether the petitioner has a right to maintain this suit and whether the orders of the Commission are such as may properly be enjoined. The answer to the third question is obvious. Only the United States can sue to enjoin, for an alleged violation of the Anti-Trust laws, a combination of common carriers subject to the provisions of the Interstate Commerce Act with respect to a matter within the jurisdiction of the Interstate Commerce Commission. U. S. C. Title 15, Par. 26; Central Transfer Co. v. Terminal R. Assoc. of St. Louis (CCA. 8), 61 Fed. (2d) 546, 550, affirmed, 288 U. S. 469, 473.

The record of the proceedings before the Commission has not been presented to this Court, and the affidavits which have been received afford only an imperfect and incomplete picture of the situation. In view of the absence of the record of the evidence which the Commission had before it, we must accept its findings as conclusive.

"* * * obviously we hardly could sustain a decision rejecting the reparation order upon the ground that there was not sufficient evidence before the Commission to support it when the whole of the evidence that was before the Commission was not produced." Spiller v. A. T. & S. F. Ry. Co., 253 U. S. 117, 125.

See also: L. & P. B. Ry. Co. vs. United States, 257 U. S. 114, 116; N. C. & S. L. Ry. Co. vs. State of Tennessee, 262 U. S. 318, 324; Edward Hines Yellow Pine Trustees vs. United States, 263 U. S. 143, 148; C. I. & L. Ry. Co. vs. United States, 270 U. S. 287, 295; Dept. of Public Works of Washington vs. United States (D. C.), 55 Fed. (2d) 392, 395.

We do not understand that the petitioner denies the conclusiveness of the findings of the Commission in the absence

of the record, but its contention is that this Court should hold that the orders of the Commission are upon their face not supported by the Commission's findings and are contrary to such findings and to an established policy of Congress. This policy is enunciated in Section 500 of the Transportation Act of 1920, (U. S. C., Title 49, Par. 142), which reads:

"It is declared to be the policy of Congress to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve, in full vigor both rail and water transportation. * * *"

The Commission found that the interveners were handling practically no long hauls of sugar from the South to the northern distributing points, their sugar traffic consisting only of occasional special or emergency shipments; that the diversion of the sugar traffic to the barge lines in 1932 cost the principal intervener, the Illinois Central Railroad Company, probably half a million dollars in revenue; that sugar constitutes about one-third of the total tonnage of the petitioner and yields over forty percent of is total [fol. 107] revenue; that the rates proposed by the rail carriers were more than high enough to pay the costs of the service rendered; and that many commodities were handled by these roads at lower rates than those proposed for sugar.

It appears that the Federal Barge Line, another carrier by water operating in the same territory and which is also largely dependent upon the sugar traffic for its revenues, does not protest the proposed rates, preferring to let the competing railroads set the rate level. There is no evidence before us which would justify a finding that the petitioner cannot, under favorable conditions, carry sugar at as low a rate as its rail competitors. It is probably not important whether it can or cannot.

The petitioner's claim of arbitrariness is mainly a general one. It does, however, contend that there is great diversity in rates from the Atlantic seaboard and those from the Gulf to the same interior points; that the Commission did not state the particular method of computation by which it arrived at the rate levels it approved, and must have taken a mathematical mean of the costs testified to by witnesses for both sides and then applied a certain differ-

ential; and that, while the per-ton per-mile earnings of the roads from this sugar traffic under the new rates would compare favorably with the system earnings of the Illinois Central Railroad, this is an unfair basis of comparison, because the costs of the Illinois Central system are the lowest of any of the roads concerned.

It seems evident to us that the question of the propriety of putting into effect the proposed rates, their reasonableness, and their effect upon shippers and competitors was one peculiarly for the Commission and one into which the courts should not inject themselves unless it clearly appears that the orders of the Commission were arbitrary and that it exceeded its powers in making them. The Commission considered all factors entering into the problem and at least attempted to reach a result which was fair to all parties concerned. The Commission's report indicates a careful analysis of the entire situation. Neither the rates proposed by the railroads nor those suggested by the petitioner were adopted in full. The conclusion of the Commission that the rate levels which it approved and suggested were reasonable and lawful appears to have been supported by the record before it. Assuming, as we must, that these rates are ample to cover the costs of service, we think it is impossible for this Court to say that the orders which the Commission made were arbitrary.

The only question which then remains is whether such orders are in contravention of the policy of Congress enunciated in Section 500 of the Transportation Act hereinbefore quoted. The language of that section is nothing more than a general statement of policy. There is no guaranty contained in it of immunity from competition, nothing to indicate an intention on the part of Congress that a common carrier by water was to be given a preference in the matter of rates over a common carrier by rail, and nothing to indicate that a shipper was to be required to pay for the transportation of a commodity, where rail and water lines were in competition, a rate high enough to enable each carrier to operate at a profit.

[fol. 108] Reduced to its lowest terms the petitioner's contention virtually is that an order of the Interstate Commerce Commission which permits a railroad to reduce its rates to a point which will prevent a barge line from profitably competing with it is arbitrary, discriminatory and

void. We cannot agree. If the rates fixed or permitted by the orders would be reasonable in the absence of barge competition, we think they are no less reasonable because of such competition.

The petitioner's contention with respect to the denial of its motion for a rehearing on the ground of changed economic conditions is sufficiently answered by the language of the Supreme Court in United States vs. Northern Pacific Railway Company, 288 U. S. 490, 494:

"The decision in the Santa Fe case (284 U. S. 248) is not to be extended to require a rehearing in every rate case for changed economic conditions, however insignificant the effect of the order on carrier revenue. The rule announced, while intended to safeguard substantial rights of the railroads, may not be invoked where its application would disenable the Commission to protect the interest of the public."

Finding the facts and the law to be as we have stated, we reach the conclusion that the defendants and interveners are entitled to a decree dismissing the bill of complaint. They may, upon reasonable notice to the petitioner, present to this Court proposed findings of fact, declarations of law, and a decree, in accordance with the views expressed in this decision.

Dated this 13th day of October, 1933.

John B. Sanborn, U. S. Circuit Judge. C. B. Faris, U. S. District Judge. Charles B. Davis, U. S. District Judge.

[fol. 109] IN UNITED STATES DISTRICT COURT

[Title omitted]

Findings of Fact and Conclusions of Law—Filed Nov. 21, 1933

Findings of Fact

I

The Mississippi Barge Line Company, the petitioner herein, is a common carrier by water operating between New Orleans, Louisiana and points on the Mississippi and

Ohio rivers, including St. Louis, Missouri, Louisville, Kentucky and Cincinnati, Ohio. It has, and operates under, a certificate of public convenience issued by the Interstate Commerce Commission and it has joined with common [fol. 110] carriers by rail subject to the Interstate Commerce Act, in establishing through routes and joint rates on various commodities, including sugar, which said rates are subject to the jurisdiction of the Interstate Commerce Commission. Its port-to-port rates are not subject to regulation by the Commission.

II

By schedules filed with the Interstate Commerce Commission pursuant to Section 6 of the Interstate Commerce Act, to be effective October 1, 1932, the rail carriers serving the sugar refineries at New Orleans, Louisiana, proposed schedules of reduced all-rail rates on sugar from New Orleans and other southern refining points to Chicago, Illinois, St. Louis, Missouri and other points in northern territory.

These schedules established two different sets of rates, one based upon a minimum weight of 60,000 pounds per car, and the other based upon a minimum weight of 80,000 pounds per car. The rate proposed from New Orleans to Chicago was 39 cents per 100 pounds, minimum weight 60,000 pounds, and 30 cents per 100 pounds, minimum weight 80,000 pounds, as compared to the old rate of 56 cents per 100 pounds, minimum 60,000 pounds.

The purpose of the rail carriers in reducing the all-rail rates was to recover the tonnage in sugar which had been diverted to the competing water and truck carriers whose rates were lower and of preventing further losses in that traffic. Such diversion had seriously cut the rail carriers' revenue on this commodity; in 1932, it had cost the Illinois Central Railroad Company about a half million dollars.

[fol. 111]

III

By its order dated September 30, 1932, the Interstate Commerce Commission, acting under the provisions of Section 15 (7) of the Interstate Commerce Act, suspended the said proposed rates and instituted a proceeding to determine the lawfulness of said rates. Said proceeding was entitled "Investigation and Suspension Docket No. 3814,

Sugar from Gulf and South Atlantic Points." To this proceeding the rail carriers proposing the new rates were made parties respondent. The petitioner herein, Mississippi Valley Barge Line Company, was one of many who protested and opposed the new rates.

Hearings were held in October 1932, on the issues raised by the proceedings, and were participated in by the protestants, including the petitioner in this case; a large volume of testimony was taken, oral argument was had before the Commission, briefs were submitted and thereafter the Commission made and entered its report and order dated July 3, 1933, wherein and whereby it found that the rates proposed for all rail movement at 60,000 pounds minimum were justified, but that those proposed for 80,000 pounds minimum were not justified. It therefore ordered the proceeding dismissed as to the former, thus in effect approving said rates, but as to the latter it required cancellation of the schedules in so far as the rates based on 80,000 pounds minimum were concerned by the Commission found that the carriers had justified rates 4 cents higher than those proposed for that minimum.

Thereafter by an amendatory order dated July 18, 1933, it authorized the establishment of the rates, 80,000 pounds minimum, approved in its report, namely 4 cents higher than those first proposed. Thereupon the carriers pub- [fol. 112] lished and filed schedules in accordance with the order of the Commission, and the rates both on 60,000 pounds minimum and 80,000 pounds minimum went into effect July 29, 1933, and July 31, 1933, respectively.

IV

The Interstate Commerce Commission found that the rates which it approved would be compensatory. It said (report, sheet 21):

> There can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service. The earnings would compare favorably with those of the eastern lines just considered and would generally accrue from single-line straightaway water-level hauls by economically and efficiently operated carriers in a territory of heavy traffic density. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield 240 per minimum

carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26 cents. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15 cents per car-mile and 6 mills per ton-mile. The traffic considered would be principally added tonnage that could probably be carried at far lower costs. Many commodities are handled by respondents at much lower charges than they here propose for sugar. The record affords ample justification for the proposed rates, minimum 60,000 pounds. We are of opinion, however, that the proposed rates, minimum 80,000 pounds, are somewhat lower than the necessities of the situation require, and our findings so recognize.

V

The Interstate Commerce Commission also considered the cost of transportation by barge. It said (report, sheets 14, 15):

The proposed rate of 30 cents from the New Orleans district to Chicago represents a 26-cent reduction in the present rates of 56 cents. Teh basis for the amount of the proposed rate is the New York-Chicago water rate, which we saw in the above-considered case was last year probably somewhere between 22 and 27 cents, but to which several cents should be added to represent extra terminal expenses and rail service superiority. Protestant Mississippi Valley Barge Line suggests that we hold respondents to a rate of [fol. 113] 40 cents at Chicago, which is the proposed rate that would have applied from New York to Chicago until March 31, 1933.

From the New Orleans district to St. Louis the proposed rate is 28 cents, 2 cents below that proposed to Chicago. It represents a reduction of 24 cents, the present rate being 52 cents. The standard barge-line rate from the New Orleans district to St. Louis was 42 cents, except that the Mississippi Valley Barge Line maintained a rate of 37 cents. This rate was established in anticipation of an announced contemplated reduction of 45 cents in the all-rail rate from Louisiana points to St. Louis due to the reduction in the fifth-class rate from Baltimore to Chicago brought about by the eastern class rate revision. The 28-cent rate is based on competition with contract-barge

operators on the Mississippi River. Rates from the New Orleans district to St. Louis as low as 19 cents have been quoted by contract-barge operators for the movement of large cargoes and a rate of 18 cents for this service is regarded as compensatory by parties that should be in position to know, but, so far as appears, such rates have not been used. The contract rate generally paid by one of the principal Louisiana refiners was 20 cents. It covered only transportation and did not include loading, unloading, or marine insurance. The charges for these incidental items, according to one of respondents' witnesses, an official of the refiner mentioned, was between 3 and 4 cents, but according to protestant's witness, a traffic official of the Mississippi Valley Barge Line, they are more nearly 9 cents.

And (report, sheets 15, 16):

The traffic manager of one of the principal refiners suggested 6 cents as a proper differential for the standard barge lines under the all-rail lines. Accepting here a differential of 6 cents for the purpose of discussion and adding it to the 23-cent minimum contract-barge cost, on account of the superior service of the rail lines, makes 29 cents as a minimum from New Orleans to St. Louis, or 1 cent more than the corresponding proposed all-rail rate. Accordingly, even without taking into consideration the fact that most of the river-borne sugar must be stored longer pending distribution, the 28-cent rate may be too low from a competitive standpoint. If the usual 20 per cent differential were applied to that rate, it would reduce to 22.5 cents the standard New Orleans-St. Louis barge rate, which would apply for a much more regular and perhaps otherwise more dependable, desirable, and valuable service than the contract-barge operators provide. It would no doubt stop the use of the contract barges. The maximum all-rail rate from the New Orleans district to St. Louis that would be necessary to narrow the regulated barge lines' differential to about 6 cents, if the 20 per cent basis were used, is 31 cents. The Mississippi Valley Barge Line suggests that we hold respondents to a rate of 38 cents at St. Louis, which, provided the 20 per cent basis is con- [fol. 114] tinued, would reduce the differential in its favor from 10 cents to 7.5 cents, and give protestant a rate of

30.5 cents. A 38-cent rate for respondents from the New Orleans district to St. Louis would far exceed the water rate from New York to Chicago. If the long-and-short-haul rule is to be observed, the rate from the New Orleans district to St. Louis can not exceed that from the same district to Chicago.

VI

The petitioner herein, Mississippi Valley Barge Line Company, filed with the Commission on July 28, 1933, a motion for a rehearing upon the ground of changed economic conditions and the failure of the Commission to give effect to the Congressional mandate of Section 500 of the Transportation Act, 1920 (U. S. Code, Tit. 49, Sec. 142). This motion was denied.

VII

On July 27, 1933, the Mississippi Valley Barge Line Company filed this suit, under U. S. Code, Title 28, Section 41 (28), to enjoin enforcement of the orders of July 3, 1933, and July 18, 1933, in so far as they relate to the proceeding Investigation and Suspension Docket No. 3814.

VIII

The record before the Interstate Commerce Commission, containing the evidence upon which the Commission acted in making and entering its report and orders, was not introduced in evidence in this case before this Court. Affidavits were introduced purporting mainly to show the damage which it was asserted would result to petitioner by reason of the orders of the Commission.

[fol. 115] Conclusions of Law

I

As the record of the proceedings before the Commission has not been presented to this Court, the Court must accept the findings of the Commission as conclusive.

II

The orders of the Commission upon their face are supported by the findings contained in its report.

III

The findings and orders of the Commission are not arbitrary or discriminatory, or void or in violation of, or contrary to, any provision of law of any mandate of Congress, particularly are they not contrary to the mandate of Section 500 of the Transportation Act, 1920. Said Section 500 contains no guaranty of immunity from competition, nor anything to indicate an intention on the part of Congress that a common carrier by water was to be given a preference over a common carrier by rail, nor anything to indicate that a shipper was to be required to pay for the transportation of a commodity, where rail and water lines are in competition, a rate high enough to enable each carrier to operate at a profit.

IV

The Interstate Commerce Commission in entering the orders complained of did not exceed the power conferred upon it by Congress and did not fail to observe and comply with all the requirements of the applicable law in the proceeding before it, but gave heed to all such laws and proceeded in full conformity to the same.

[fol. 116] V

There was a full and fair hearing accorded to all parties to the proceeding before the Interstate Commerce Commission, including the petitioner in this suit.

VI

There was no abuse of discretion on the part of the Commission in denying the petitioner's motion for rehearing.

VII

The orders of the Interstate Commerce Commission sought to be enjoined and set aside in this suit are a valid exercise of the authority vested in the Commission and no error was committed by it in the proceedings, findings and orders. The bill of complaint must, therefore, be dismissed.

[fol. 117] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI, EASTERN DIVISION

In Equity. No. 10496

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Defendants

FINAL DECREE—Filed Nov. 21, 1933

This cause came on for final hearing before the specially constituted Court of three Judges, and the Court, having heard and considered the arguments of counsel for the respective parties, and being of opinion, for the reasons set forth in its written decision filed herein on October 13, 1933, that the relief prayed should be denied and the bill of complaint dismissed,

Ordered, adjudged and decreed that the prayer of the bill of complaint be, and the same is hereby denied, and the bill of complaint is dismissed, at plaintiff's costs.

This 21st day of November, 1933.

(Signed) John B. Sanborn, United States Circuit Judge. C. B. Faris, United States District Judge. Charles B. Davis, United States District Judge.

[fol. 118] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed Jan. 16, 1934

To the Honorable John B. Sanborn, United States Circuit Judge; Charles B. Faris, United States District Judge, and Charles B. Davis, United States District Judge:

The Mississippi Valley Barge Line Company, a corporation, your petitioner in the above entitled cause, deeming itself aggrieved by the decree of the three-judge court, prays that it may be permitted to take an appeal from the

decree rendered in the above cause on the 21st day of November, 1933, by the said three-judge court, to the Supreme Court of the United States, for the reasons specified in the [fol. 119] assignment of errors which is filed herewith, and prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers on which said decree was based, duly authenticated, be sent to the Supreme Court of the United States sitting at Washington, D. C., under the rules of said court in such cases made and provided, said case being appealable to said Supreme Court by virtue of Federal enactment, to-wit, U. S. C. A. Title 28, Sections 47, 47-a.

And your petitioner further prays that a proper order relating to the security to be required of it be made.

Thompson, Mitchell, Thompson & Young, by (Sgd.) J. R. Van Slyke, Attorneys for Petitioner.

Allowed this 16th day of January, 1934.

(Sgd.) Charles B. Davis, District Judge.

[fol. 120] In United States District Court

[Title omitted]

Assignment of Errors—Filed Jan. 16, 1934

Comes now the Mississippi Valley Barge Line Company, a corporation, petitioner (appellant) in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of the appeal in the above entitled cause from the decree entered by the three-judge court on the 21st day of November, 1933, said appeal being to the Supreme Court of the United States:

[fol. 121] I

The three-judge court erred in entering its final decree in the above entitled cause and upon the date above mentioned ordering, adjudging and decreeing that the prayer of the bill of complaint be denied and the bill of complaint dismissed.

II

The three-judge court erred in giving as a finding of fact, and at the request of defendants (appellees), their finding of fact numbered IV which reads as follows:

"'The Interstate Commerce Commission found that the rates which it approved would be compensatory. It said (Sheet 21):

'There can be no reasonable doubt that the proposed rates are high enough to pay more than the cost of the service. The earnings would compare favorably with those of the eastern lines just considered and would generally accrue from single-line straightaway water-level hauls by economically and efficiently operated carriers in a territory of heavy traffic density. The 30-cent rate from New Orleans to Chicago, for instance, about 13 per cent of the corresponding first-class rate, would yield $240 per minimum carload. For the short-line distance of 912 miles the minimum car-mile earnings would be about 26 cents. The ton-mile earnings would be about 6.5 mills. System costs for all traffic on the Illinois Central are about 15 cents per car-mile and 6 mills per ton-mile. The traffic considered would be principally added tonnage that could probably be carried at far lower costs. Many commodities are handled by respondents at much lower charges than they here propose for sugar. The record affords ample justification for the proposed rates, minimum 60,000 pounds. We are of opinion, however, that the proposed rates, minimum 80,000 [fol. 122] pounds, are somewhat lower than the necessities of the situation require, and our findings so recognize.'"

III

The three-judge court erred in giving as a conclusion of law, at the request of defendants (appellees) their conclusion of law numbered II, in the following words:

"The orders of the Commission upon their face are supported by the findings contained in its report."

IV

The three-judge court erred in giving as a conclusion of law, at the request of defendants (appellees) their conclusion of law numbered III, in the following words:

"The findings and orders of the Commission are not arbitrary or discriminatory, or void or in violation of, or contrary to, any provision of law or any mandate of Congress, particularly are they not contrary to the mandate of Section 500 of the Transportation Act, 1920. Said Section 500 contains no guaranty of immunity from competition, nor anything to indicate an intention on the part of Congress that a common carrier by water was to be given a preference over a common carrier by rail, nor anything to indicate that a shipper was to be required to pay for the transportation of a commodity, where rail and water lines are in competition, a rate high enough to enable each carrier to operate at a profit."

V

The three-judge court erred in giving as a conclusion of law, at the request of the defendants (appellees) their conclusion of law numbered IV, in the following words:

"The Interstate Commerce Commission in entering the orders complained of did not exceed the powers conferred upon it by Congress and did not fail to observe and comply with all the requirements of the applicable law in the proceedings before it, but gave heed to all such laws and proceeded in full conformity to the same."

[fol. 123]

VI

The three-judge court erred in giving as a conclusion of law, at the request of the defendants (appellees) their conclusion of law numbered V, in the following words:

"There was a full and fair hearing accorded to all parties to the proceeding before the Interstate Commerce Commission, including the petitioner in this suit."

VII

The three-judge court erred in giving as a conclusion of law, at the request of the defendants (appellees) their conclusion of law numbered VI, in the following words:

"There was no abuse of discretion on the part of the Commission in denying the petitioner's motion for rehearing."

VIII

The three-judge court erred in giving as a conclusion of law, at the request of the defendants (appellees), their conclusion of law numbered VII, in the following words:

"The orders of the Interstate Commerce Commission sought to be enjoined and set aside in this suit are a valid exercise of the authority vested in the Commission and no error was committed by it in the proceedings, findings and orders. The bill of complaint must, therefore, be dismissed."

IX

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 1 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"1. The court declares the law to be that the Mississippi Valley Barge Line Company has a legal right and interest and is entitled to file and prosecute this action."

[fol. 124] X

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 2 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"2. That the matters and things presented by the petitioner in its bill are not moot."

XI

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 3 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"3. That the defendant rail carriers who have entered their appearance in this proceeding are subject to the jurisdiction and orders of the court."

XII

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 4 submitted

to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"4. That Section 500 of the Transportation Act of 1920, by direct mandate, places a duty and requires the Interstate Commerce Commission, as a Federal agency, to follow said statute insofar as rail and water transportation are to be preserved in full vigor."

XIII

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 5 submitted to the court by plaintiff (appellant) in compliance with [fol. 125] suggestion of the court, and in words as follows:

"5. That the decision and order of the Commission upon its face violates and admits a violation of the mandate of this statute."

XIV

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 6 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"6. That the Sherman Anti-Trust law determines a right in this petitioner that rail lines shall not by concerted or joint action or agreement do anything that will directly or indirectly restrain or tend to restrain commerce between the states or produce or tend to produce a monopoly in connection with transportation; that the Interstate Commerce Commission, as a Federal agency, is bound by this enactment and cannot do, order or permit any violation of this right, and since the court in its finding has found that this statute has been disregarded by the Commission in its decision and order and that this right in your petitioner has been denied by the decision and order of the Commission, that, therefore, said decision and order of the Interstate Commerce Commission is unlawful and void."

XV

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 7 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"7. That the Commission in its decision and order admits that said decision and order will result in a violation of the Sherman Anti-trust Law in that it will tend to restrict commerce between the states and produce or tend to produce a monopoly in connection with transportation."

[fol. 126] XVI

The three-judge court erred in refusing to give requested conclusion and declaration of law numbered 8 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"8. That the decision and order of the Interstate Commerce Commission admits that the rates approved or designated for application for rail lines will violate the third section of the Interstate Commerce Act and specifically refers in this connection to Davenport versus Des Moines as a typical example; that the Commission by said statement admits a violation of Section 3 of the Interstate Commerce Act, and the statement of the Commission that the rail carriers intend to cure the situation does not cure the violation and that said decision and order are therefore unlawful and void."

XVII

The three-judge court erred in refusing to give requested finding of fact numbered 9 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"9. That the rail carriers concurring in the Emerson Tariffs, above specifically set forth, since the middle of 1932, have reduced rates on bagging, canned goods, coffee, corn, cotton, glassware, paper pulp, rice, soap, sugar, sulphur and tobacco, which is every commodity handled by the Mississippi Valley Barge Line in excess of 1,000 tons per year."

XVIII

The three-judge court erred in refusing to give requested finding of fact numbered 10 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"10. That sugar tonnage on the Mississippi Valley Barge Line in years past has constituted 33⅓% of its total tonnage moving over and along its lines and approximately 40% of its total revenue."

[fol. 127]

XIX

The three-judge court erred in refusing to give requested finding of fact numbered 13 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"13. That in order for barge line service to attract tonnage to said operation it is necessary and essential that the barge operation charge a rate differentially lower than the all rail rate between the same points."

XX

The three-judge court erred in refusing to give requested finding of fact numbered 17 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"17. That the rail carriers concurring in Agent Emerson's Tariffs and supplements above set forth have, by joint and concurrent action, proposed particular tariffs applicable to rates by rail lines on sugar from various origins and to designated destinations by virtue of affirmative action on the part of the executive officers having to do with said matters by the various rail lines, and that the rates proposed by said rail carriers and the rates approved, designated or authorized by the Commission in its order were intended to and do restrain commerce between the various states and that the Commission in said decision and order recognizes the fact that these rates will have this effect."

XXI

The three-judge court erred in refusing to give requested finding of fact numbered 20 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"20. That the Commission makes no finding that the proposed rates or rates justified or designated are compensa-

tory and such as are incident and necessary to an effective and efficient transportation service, and alone makes the finding that the proposed rates are high enough to pay more than the cost of the service."

[fol. 128]

XXII

The three-judge court erred in refusing to give requested finding of fact numbered 21 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"21. That the rates justified or designated by the Commission will result in a higher rate over the same lines of rail carriers from the gulf ports to points intermediate to St. Louis than to St. Louis and without Fourth Section relief."

XXIII

The three-judge court erred in refusing to give requested finding of fact numbered 22 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"22. That the rates justified or designated to points in the destination territory to which said rates apply will produce a volume of rates to certain destinations which are substantially lower than to adjacent destinations, and that the Commission in said decision admits this violation of Section 3 of the Interstate Commerce Act and justifies or attempts to justify said condition by the statement that the rail carriers intend to clear this condition, and the Court finds that a clearing of the situation such as is mentioned in the decision of the Commission, Davenport vs. Des Moines, by graduating the rates from Davenport to Des Moines, will simply place the violation of Section 3 of points further distant than Des Moines, and that the same situation results in the rates justified or designated to points east of the river and that the Commission attempts to justify this situation alone by the statement that on one is complaining of any injury."

XXIV

The three-judge court erred in refusing to give requested finding of fact numbered 23 submitted to the court by plain-

tiff (appellant) in compliance with suggestion of the court, and in words as follows:

[fol. 129] "23. That the Mississippi Valley Barge Line will be adversely affected by the rates proposed by the rail carriers and justified or designated by the Commission, and that said rates will result in irreparable injury and damage to the petitioner."

XXV

The three-judge court erred in refusing to give requested finding of fact numbered 24 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"24. That the Mississippi Valley Barge Line petitioned the Interstate Commerce Commission, in accordance with the rules of practice of said Commission and in connection with its Docket I. & S. 3814, and forwarded said motion to the Commission under date of July 25, 1933; that in said petition the Mississippi Valley Barge Line alleged changed conditions which had resulted and obtained since the hearing or the making of the record in said proceeding; that the Commission denied said motion; that said motion for rehearing was in the nature of a supplemental bill, presenting new and radically different situations which had supervened since the record before the Commission was made."

XXVI

The three-judge court erred in refusing to give requested finding of fact numbered 25 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"25. That the petitioner, being advised by the order of the Commission that the rates proposed and justified or the rates designated by the Commission and here involved, would become effective on July 29th and 31st, 1933, respectively, advised the Commission of the intent and purpose of the petitioner in this proceeding to file a suit to enjoin the decision and order of said Commission, and further advised said Commission that the District Judges of the United States District Court at St. Louis, Missouri, are

[fol. 130] away from St. Louis and that it was, therefore, impossible for the petitioner to secure an interlocutory stay or order before the effective date of said rates and requested the Commission to change the effective date of said rates so that the petitioner, Mississippi Valley Barge Line Company, could secure and arrange for an expedited hearing by a three-judge court, and thus hold said rates in abeyance until a decision had been rendered by said Court; that said particular communication was addressed to the Commission on July 26, 1933, and on the same day the Interstate Commerce Commission through its Chairman, advised the petitioner that the Interstate Commerce Commission could not consistently comply with the above request, and that said rates have become effective alone by reason of the failure of the Commission to extend the effective date of said rates and without fault upon the part of the petitioner in the instant proceeding."

XXVII

The three-judge court erred in refusing to give requested finding of fact numbered 27 submitted to the court by plaintiff (appellant) in compliance with suggestion of the court, and in words as follows:

"27. That the petitioner and parties defendant, including the rail carriers, stipulated and agreed in open court that the affidavits presented by petitioner and defendants should be considered as testimony in said cause and be considered by the Court to determine the facts relative to the matters in controversy, and at the same time agreed and stipulated that they would waive any preliminary writ or order and that the matters and things involved in this proceeding could by the Court be determined as a final order from which an appeal could be taken direct to the Supreme Court of the United States."

XXVIII

The three-judge court erred in failing to consider, give or reject any and all of the conclusions of law or finding of fact presented to the court by the plaintiff (appellant) in accordance with the suggestion of the court. This includes [fol. 131] matters specifically set forth in paragraph IX to and including XVII specifically set forth above.

Wherefore, petitioner prays that said decree be reversed, and for such other and further relief as to the court may seem just and proper.

Dated the 16th day of January, 1933.

Thompson, Mitchell, Thompson & Young, (by (Sgd.) J. R. Van Slyke, Attorneys for Petitioner (Appellant).

[fol. 132] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed Jan. 16, 1934

The petition of Mississippi Valley Barge Line Company, a corporation, petitioner in the above entitled cause, praying appeal from the final decree heretofore entered in this Court dismissing its petition, being now presented,

It is hereby ordered that an appeal be allowed to the Supreme Court of the United States as prayed for and that a certified transcript of the record, testimony, stipulations, and all proceedings be forthwith transmitted to the Supreme Court of the United States in a manner provided by law.

[fol. 133] It is further ordered that bond for costs on appeal to be given by petitioner be, and the same hereby is fixed at the sum of Five Hundred Dollars ($500.00), conditioned as provided by law.

Dated the 16th day of January, 1934.

Charles B. Davis, District Judge.

[fols. 134 & 135] Bond on appeal for $500.00 approved and filed Jan. 16, 1934, omitted in printing.

[fol. 136] In United States District Court

[Title omitted]

Præcipe for Transcript of Record—Filed Jan. 31, 1934

To the Clerk of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri:

In making up the transcript of the record in the above entitled cause for the Supreme Court of the United States

upon appeal of the petitioner therein, will you please incorporate into such transcript the following portions of the record:

1. Amended bill of petitioner, also Exhibit "A" and Exhibit "B", to-wit, decision and order of the Commission under date of July 3, 1933, attached to the original bill, [fol. 137] and substituted Exhibit "C", being amended order of the Commission under date of July 18, 1933, and supplemental petition asking affirmative relief against designated rail lines after their intervention at the hearing at St. Paul, Minnesota.
2. Answer of the United States of America as filed in said cause.
3. Answer of the Interstate Commerce Commission as filed in said cause.
4. Entry of appearance, including caption, of railroad interveners.
5. Answer as filed in said cause of interveners, Illinois Central Railroad Company, et al.
6. Statement of the evidence.
7. Opinion of the Court.
8. Decree of the Court.
9. Petition for appeal.
10. Bond on appeal.
11. Order allowing appeal.
12. Assignment of errors.
13. Conclusions of law numbered I, II, III, IV, V, VI, and VII as requested by the defendants and given by the Court.
14. Findings of fact numbered I, II, III, IV, V, VI, VII and VIII requested by the defendants and given by the Court.
15. Findings of fact numbered 1 to 27, inclusive, requested by the petitioner—no action taken by the Court.
16. Declarations of law numbered 1 to 12, inclusive, requested by the petitioner—no action taken by the Court.
17. Citation.
18. Statement of jurisdiction.
19. Præcipe.

[fol. 138] The above being a full and complete record in this cause.

Thompson, Mitchell, Thompson & Young, by J. R. Van Slyke, Attorneys for Petitioner, Appellant.

The undersigned attorneys for the defendant and interveners in the above entitled cause hereby acknowledge service of a copy of the above Præcipe this 19 day of January, 1934.

The United States of America, by J. Crawford Biggs (A. Q.), Solicitor General. The Interstate Commerce Commission, by H. L. Underwood. Intervening Railroad Lines, other than Illinois Central Railroad Company and Louisville and Nashville R. R. Co., by Horace L. Walker. Elmer A. Smith for Illinois Central Railroad Company and Louisville and Nashville Railroad Company.

[fol. 139] IN UNITED STATES DISTRICT COURT

CERTIFICATE—Filed Feb. 15, 1934

I, the undersigned, Honorable Charles B. Davis, certify that on or before August 30, 1933, the attorneys for Mississippi Valley Barge Line Company submitted to each of the Judges of the three-judge court, requested declarations of law and findings of facts, and that the following are true copies thereof and that no action was taken upon said request by the Judges of the *the* three-judge court.

Charles B. Davis, Judge.

[fol. 140] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED FINDINGS OF FACT—Filed Feb. 15, 1934

Your petitioner presents the following finding of facts and requests the Court to find in accordance therewith:

1. That the Mississippi Valley Barge Line Company is a corporation duly organized and existing by virtue of law and authorized under its charter to engage in the transportation business as a common carrier of passengers or freight for hire.

2. That said corporation is now engaged in said business and owns, maintains and operates a line of tow-boats and

barges on the Mississippi and Ohio Rivers serving ports New Orleans, Louisiana, Cincinnati, Ohio, St. Louis, Mis-
[fol. 141] souri, and ports intermediate thereto; that its principal operating office is now and at all times mentioned in said bill was situated in the City of St. Louis in the Eastern Division of the Eastern Judicial District of Missouri.

3. That one or more of the participating carriers in Agent Emerson's Tariff, Supplement No. 54, No. 1-H, I. C. C. No. 156, and Supplement 48, 10-B, I. C. C. 165, are corporations organized under the laws of the State of Missouri and have their principal office in this judicial district.

4. That the Mississippi Valley Barge Line Company, in accordance with 45 Stat. 978, as amended May 29, 1928, (U. S. C. A. Title 49, Section 152, et seq.), as a corporation engaged or about to engage in common carrier service on the Mississippi River and its tributaries, did obtain from the Interstate Commerce Commission a certificate of public convenience and necessity in Ex Parte 99 (167 I. C. C. 41), and that the Interstate Commerce Commission in said proceeding and upon hearing found that the petitioner was an operation in public interest and of public convenience, and that said certificate is still in force and effect.

5. That various rail carriers, including those specifically designated in Exhibit "A" attached to the bill of complaint, presented tariffs to the Interstate Commerce Commission, to-wit, Supplement No. 54 to Agent Emerson's Tariff No. 1-H, I. C. C. 156, and Supplement No. 48, 10-B, I. C. C. 165, to become effective October 1, 1932; that the petitioner, on or about, to-wit, September 8, 1932, applied [fol. 142] by petition to the Interstate Commerce Commission and protested said rates and requested suspension; that thereupon and thereafter the Commission upon said petition suspended said rates and entered its order of investigation and suspension, its docket No. 3814, designated "Sugar Rates from Gulf Ports", and said Commission, after a hearing in which the petitioner participated under the rules of the Commission, rendered a decision and order under date of July 3, 1933, which decision and order was released from the office of the Commission and received by the petitioner on July 17, 1933, and that final order of the

Commission in connection with said decision was entered as of July 3, 1933, as amended July 18, 1933; that said decision and order of the Commission is attached to the bill of complaint and marked "Exhibit B", which contains the order of July 3, 1933, and substituted Exhibit "C", filed by leave of court, which contains the amended order as of July 18, 1933.

6. That the matter complained of in said petition before the Commission arose in connection with matters in the Eastern Division of the Eastern Judicial District of Missouri; that the United States of America is made a defendant in this suit pursuant to District Court Jurisdictional Act, Sections 45-a and 46, 38 Stat. 219 and 36 Stat. 1149, respectively.

7. That the Interstate Commerce Commission is an administrative tribunal created by the Act to Regulate Commerce, and is specifically charged with the administration and enforcement of the Interstate Commerce Act.

8. That the Interstate Commerce Commission in its Docket I. & S. 3814 and in said order, referred to said decision and made same a part of said order, and that said [fol. 143] Commission in said decision and order found that the purpose of the rail lines in the proposing of the rates contained in the tariff aforementioned was a drastic and sweeping reduction in rates, and that said rail lines would consider even lower rates than those proposed if said rates "do not prove sufficiently effective", and further found that the rates proposed and by the Commission found justified would result in a staggering blow to the water barge lines and would probably bring to rail carriers a heavy traffic, would stop a large part of the distribution of waterborne sugar, and dry up much of the water movement; that the proposed rates in 1931 would have cost the Federal Barge Line about $350,000.00 and wiped out its showing of net revenue; that the usual water-truck rates to interior points north and south of the Ohio River are probably from 5 to 15 cents higher than the proposed all rail rates of 28 and 30 cents, and that the Commission found that the rates of the certificated barge line from New Orleans to St. Louis was 37 to 42 cents per 100 pounds on movement of sugar.

9. That the rail carriers concurring in the Emerson Tariffs, above specifically set forth, since the middle of

1932, have reduced rates on bagging, canned goods, coffee, corn, cotton, glassware, paper pulp, rice, soap, sugar, sulphur and tobacco; which is every commodity handled by the Mississippi Valley Barge Line, in excess of 1,000 tons per year.

10. That sugar tonnage on the Mississippi Valley Barge Line in years past has constituted 33-1/3% of its total tonnage moving over and along its lines and approximately 40% of its total revenue.

[fol. 144] 11. That the purpose of the rail carriers in proposing the rates in question is to restrict commerce between the states and will tend to produce a monopoly in the movement of sugar over the rail lines.

12. That the rates applicable to the 60,000 pounds minimum justified by the decision and order of the Commission in I. & S. 3814, and the rates designated and authorized for application on the 80,000 pounds minimum, which rates have become effective, will cripple or entirely eliminate the petitioner from continuing its operation as a barge line.

13. That in order for barge line service to attract tonnage to said operation it is necessary and essential that the barge operation charge a rate differentially lower than the all rail rate between the same points.

14. That under the proposed or designated rates a major portion of the sugar tonnage will move on the lower rate, to-wit, 80,000 pound minimum.

15. That the Commission in its decision and order justified the rates proposed on the 60,000 pounds minimum and authorized the rail carriers to increase the proposed rates on the 80,000 pounds minimum 4¢ per 100 pounds, and that said rates are the only rates that could have been published by virtue of the order and authorization of the Commission.

16. That the rates proposed by the rail carriers and either justified, designated or authorized for rail application are below the present rates of the certificated barge line, both as to rates from gulf ports to interior destinations and rates from the gulf ports to ports upon the Ohio [fol. 145] and Mississippi Rivers served by the petitioner.

17. That the rail carriers concurring in Agent Emerson's Tariff and supplements above set forth have, by joint and

concurrent action, proposed particular tariffs applicable to rates by rail lines on sugar from various origins and to designated destinations by virtue of affirmative action on the part of the executive officers having to do with said matters by the various rail lines, and that the rates proposed by said rail carriers and the rates approved, designated or authorized by the Commission in its order were intended to and do restrain commerce between the various states and that the Commission in said decision and order recognizes the fact that these rates will have this effect.

18. That the rail rates found not justified by the Commission on the 80,000 pounds minimum were increased 4¢ and the rail carriers were authorized to put said rates into effect; that said rates so designated do not affect or change the situation with reference to the intent of the rail carriers or the effect of said rates, in so far as the rates designated by the Commission will tend to produce this result, for the reason that the Commission in its decision finds that the competitive rate that the rail lines are attempting to meet and the rates proposed to interior points north and south of the Ohio River will be from 5 to 15 cents lower than the barge-truck rate and increasing this rate 4 cents still leaves this statement as controlling and makes a difference in the rates of 1 to 11 cents upon the 80,000 pounds minimum, and that in from port to port rates the increase of 4¢ does not bring this rate to the level of the present rate charged by certificated barge lines.

[fol. 146] 19. That the decision of the Commission admits that it is improbable that the rail carriers by the rates proposed or designated can or will recapture sugar tonnage in sufficient amounts to compensate them for the loss which they will sustain in the present movement and under the rates charged by the order of this Commission.

20. That the Commission makes no finding that the proposed rates or rates justified or designated are compensatory and such as are incident and necessary to an effective and efficient transportation service, and alone makes the finding that the proposed rates are high enough to pay more than the cost of the service.

21. That the rates justified or designated by the Commission will result in a higher rate over the same lines of

rail carriers from the gulf ports to points intermediate to St. Louis than to St. Louis and without Fourth Section relief.

22. That the rates justified or designated to points in the destination territory to which said rates apply will produce a volume of rates to certain destinations which are substantially lower than to adjacent destinations, and that the Commission in said decision admits this violation of Section 3 of the Interstate Commerce Act and justifies or attempts to justify said condition by the statement that the rail carriers intend to clear this condition, and the Court finds that a clearing of the situation such as is mentioned in the decision of the Commission, Davenport vs. Des Moines, by graduating the rates from Davenport to Des Moines, will simply place the violation of Section 3 of points further distant than Des Moines, and that the same [fol. 147] situation results in the rates justified or designated to points east of the river and that the Commission attempts to justify this situation alone by the statement that no one is complaining of any injury.

23. That the Mississippi Valley Barge Line will be adversely affected by the rates proposed by the rail carriers and justified or designated by the Commission, and that said rates will result in irreparable injury and damage to the petitioner.

24. That the Mississippi Valley Barge Line petitioned the Interstate Commerce Commission, in accordance with the rules of practice of said Commission and in connection with its Docket I. & S. 3814 and forwarded said motion to the Commission under date of July 25, 1933; that in said petition the Mississippi Valley Barge Line alleged changed conditions which had resulted and obtained since the hearing or the making of the record in said proceeding; that the Commission denied said motion; that said motion for rehearing was in the nature of a supplemental bill, presenting new and radically different situations which had supervened since the record before the Commission was made.

25. That the petitioner, being advised by the order of the Commission that the rates proposed and justified or the rates designated by the Commission and here involved,

would become effective on July 29th and 31st 1933, respectively, and advised the Commission of the intent and purpose of the petitioner in this proceeding to file a suit to enjoin the decision and order of said Commission, and further advised said Commission that the District Judges of the United States District Court at St. Louis, Missouri, are away from St. Louis and that it was, therefore, im- [fol. 148] possible for the petitioner to secure an interlocutory stay or order before the effective date of said rates and requested the Commission to change the effective date of said rates so that the petitioner, Mississippi Valley Barge Line Company, could secure and arrange for an expedited hearing by a three-judge court, and thus hold said rates in abeyance until a decision had been rendered by said Court; that said particular communication was addressed to the Commission on July 26, 1933, and on the same day the Interstate Commerce Commission, through its Chairman, advised the petitioner that the Interstate Commerce Commission could not consistently comply with the above request and that said rates have become effective alone by reason of the failure of the Commission to extend the effective date of said rates and without fault upon the part of the petitioner in the instant proceeding.

26. That the parties, petitioner and defendants, including the rail carriers, in open court consented that Honorable John B. Sanborn, Circuit Judge, should sit instead of Honorable Archibald K. Gardner, designated in the original order forming a three-judge court.

27. That the petitioner and parties defendant, including the rail carriers, stipulated and agreed in open court that the affidavits presented by petitioner and defendants should be considered as testimony in said cause and be considered by the Court to determine the facts relative to the matters in controversy, and at the same time agreed and stipulated that they would waive any preliminary writ or order and that the matters and things involved in this proceeding could by the Court be determined as a final [fol. 149] order from which an appeal could be taken direct to the Supreme Court of the United States.

The above request for finding of facts is presented in behalf of the Mississippi Valley Barge Line Company.

Thompson, Mitchell, Thompson & Young, by J. R. Van Slyke, Its Attorneys.

[fol. 150] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED DECLARATIONS OF LAW—Filed Feb. 15, 1934

The Mississippi Valley Barge Line Company, petitioner in the above entitled cause, requests the Court to make the following declarations of law in the instant proceeding:

1. The Court declares the law to be that the Mississippi Valley Barge Line Company has a legal right and interest and is entitled to file and prosecute this action.

2. That the matters and things presented by the petitioner in its bill are not moot.

3. That the defendant rail carriers who have entered their appearance in this proceeding are subject to the jurisdiction and orders of this Court.

[fol. 151] 4. That Section 500 of the Transportation Act of 1920, by direct mandate, places a duty and requires the Interstate Commerce Commission, as a Federal agency, to follow said statute insofar as rail and water transportation are to be preserved in full vigor.

5. That the decision and order of the Commission upon its face violates and admits a violation of the mandate of this statute.

6. That the Sherman Anti-Trust Law determines a right in this petitioner that rail lines shall not by concerted or joint action or agreement do anything that will directly or indirectly restrain or tend to restrain commerce between the states or produce or tend to produce a monopoly in connection with transportation; that the Interstate Commerce Commission, as a Federal agency, is bound by this enactment and cannot do, order, or permit any violation of this right, and since the Court in its finding has found that this statute has been disregarded by the Commission in its decision and order and that this right in your petitioner has been denied by the decision and order of the Commission, that, therefore, said decision and order of the Interstate Commerce Commission is unlawful and void.

7. That the Commission in its decision and order admits that said decision and order will result in a violation of

the Sherman Anti-Trust Law in that it will tend to restrict commerce between the states and produce or tend to produce a monopoly in connection with transportation.

8. That the decision and order of the Interstate Commerce Commission admits that the rates approved or designated for application for rail lines will violate the third [fol. 152] section of the Interstate Commerce Act and specifically refers in this connection to Davenport vs. Des Moines as a typical example; that the Commission by said statement admits a violation of Section 3 of the Interstate Comerce Act and the statement of the Commission that the rail carriers intend to cure the situation does not cure the violation and that said decision and order are therefore unlawful and void.

9. That the Court has jurisdiction in the instant proceeding to annul and set aside the decision and order of the Interstate Commerce Commission in connection with its Docket I. & S. 3814.

10. That the Court has jurisdiction over the defendant rail carriers who have entered their appearance, to enjoin said defendants and each of them from assessing, collecting or charging the rates proposed or designated by the Commission in connection with its decision and order and in its Docket I. & S. 3814.

11. The Court declares the law to be that under the pleadings and evidence in this cause, the petitioner is entitled to affirmative relief against the order of the Interstate Commerce Commission, its Docket I. & S. 3814.

12. That the petitioner is entitled to a permanent injunction against the defendant rail carriers from assessing, collecting or charging the rates justified or designated by the Commission in its decision and order and in its Docket I. & S. 381[illegible]

The above declarations of law are requested in behalf of [fol. 153] Mississippi Valley Barge Line Company, petitioner.

Thompson, Mitchell, Thompson & Young, by J. R. Van Slyke, Its Attorneys.

[fol. 154] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DIVISION OF THE EASTERN JUDICIAL DISTRICT OF MISSOURI

In Equity. No. 10496

MISSISSIPPI VALLEY BARGE LINE COMPANY, a Corporation, Petitioner,

vs.

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION, Defendants, and Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, and New Orleans and Northeastern Railroad Company, Interveners

Appellant (petitioner) presents statement of evidence in the above entitled cause which it will ask to be incorporated in the record of said cause upon appeal to the Supreme Court of the United States.

Statement of Evidence—Filed Jan. 31, 1934

[fol. 155] Commission's Decision and Orders of July 3, 1933, and July 18, 1933, I. & S. 3814

(These are exhibits attached to original petition and admitted by all defendants in their answers as being true copies thereof. Each is fully set forth in connection with the pleadings.)

The evidence herein set forth in behalf of appellant was presented to the three-judge court at the hearing of said cause at St. Paul, Minnesota, on August 15, 1933, and said testimony was originally presented in the form of affidavits to the introduction of which defendants and interveners objected on the ground that said affidavits and the contents thereof were inadmissible in so far as they stated or purported to state facts inconsistent with, or in conflict with the statements and findings contained in the report of the Inter-

state Commerce Commission dated July 3, 1933, upon which the orders of the Commission assailed in this case were predicated. The affidavits were received subject to said objection.

At the conclusion of the hearing the petitioner, through its counsel, stated that if all parties to the proceeding would agree that the statements contained in said affidavits could and should be considered by the court as competent evidence upon final hearing by said court that the petitioner was agreeable to waiving a preliminary writ; that defendants and interveners agreed that the statements contained in said affidavits could be considered by the court as competent evidence upon a final hearing subject to said objection. Thereupon, the cause was submitted to the court for final hearing and a final decree.

The affidavits of M. L. Costley and J. L. Sheppard presented by the interveners were not objected to by the appellant and are to be considered as testimony in said cause.

(Caption, signatures and jurats are omitted in connection with the testimony hereinafter set forth.)

M. W. Howe, Phil G. Safford, L. W. Childress, J. R. Van Slyke and J. D. Beeler—testimony was presented in behalf of petitioner.

M. L. Costley and J. L. Sheppard—testimony was presented in behalf of the Railroad Companies, interveners in said action.

[fol. 156] M. W. Howe, being duly sworn, upon his oath states that he is now General Freight Agent of the Mississippi Valley Barge Line and since 1930 has been employed by said Company in its traffic department.

Affiant states that he is familiar with matters pertaining to transportation and traffic of the Mississippi Valley Barge Line, and for approximately twelve years has been associated with and employed by rail and other forms of transportation service in their traffic departments.

Affiant states that W. P. Emerson is Agent and Attorney and has specific Power of Attorney for certain carriers specifically listed on pages 5-A to 10-A of his freight tariff 1-H, I. C. C. No. 156, and on pages 8-A to 11-A of his freight tariff 10-B, I. C. C. No. 165, and affiant herewith submits

said tariffs, and by reference makes same a part of this affidavit, and affiant further submits and by reference makes a part of this affidavit Supplement No. 54 to Agent Emerson's I. C. C. 156, and Supplement 48 to Agent Emerson's [fol. 157] I. C. C. 165, and states that said supplements to said tariffs are a part of and issued for account of the designated participating carriers in the original tariff, and that said supplements specifically set forth the rates on sugar in carloads involved in the decision of the Commission in I. & S. 3814.

Affiant further states that the Mississippi Valley Barge Line, a corporation, protested said proposed rates by petition to the Interstate Commerce Commission on or about September 8, 1932, and said petition for suspension was addressed to said proposed rates on sugar from New Orleans and other designated gulf ports to various destinations specifically designated in said tariffs and supplements, and that said Commission, in response to petition of protest, suspended said rates and entered an order of investigation and suspension in its docket I. & S. 3814, and that thereafter said Commission entered upon a hearing and investigation and rendered a decision which was dated July 3, 1933, but was not released by the Commission or received by the Mississippi Valley Barge Line until July 17, 1933, and that said decision and order of the Commission was received by the Mississippi Valley Barge Line Corporation on said date, to-wit, July 17, 1933, and the Commission thereafter and on, to-wit, the 18th day of July, 1933, entered an amended order which substituted certain paragraphs for paragraphs 1, 2, 3, and 4 of the original order of the Commission above referred to, but that, insofar as said amended order changed the original order, it only affected the effective date of the rates justified or designated by the Com- [fol. 158] sion in said decision and order and in docket I. & S. 3814 by postponing the designated effective date for an additional seven days beyond that originally authorized.

Affiant further states that sugar tonnage constitutes an important movement of the petitioner's line.

Affiant further states that, from his knowledge, experience, contact, and conversation with refiners and shippers of sugar, that traffic will not move by barge if barge rates are the same as rail rates, and that this situation is recog-

nized by shippers, traffic officials, and has been recognized by the Interstate Commerce Commission.

Affiant further states that, from his experience in connection with the movement of sugar by transportation agencies, he knows that the publication of lower rates, at a minimum weight of 80,000 pounds per car, than those applicable for minimum weights of 60,000 pounds per car, will result in the movement of the great preponderance of tonnage at the lower rate and upon the 80,000 pound minimum. Affiant further states that he has read and familiarized himself with the decision and order of the Commission in the instant proceedings I. & S. 3814, and that in said decision the Commission recognizes that the rates proposed by the rail carriers from gulf ports to the destinations specifically designated in their tariffs and supplements above referred to to points north and south of the Ohio River, rail rates for application on 80,000 pound minimum carloads will be from five to fifteen cents less than the competitive rate of a barge-truck movement, and that the particular rate on the 60,000 pound minimum proposed by the rail lines is [fol. 159] justified by the decision and order of the Commission, and that, insofar as the 80,000 pound minimum the Commission has designated and authorized the concurring carriers in the tariffs above mentioned to increase said proposed rates by four cents per 100 pounds, and to establish and publish rates in accord with said authorization, and that said rates so designated and authorized by the Commission results in rates to interior points north and south of the Ohio River from one to eleven cents less than the competitive rate for barge-truck movement from the same origins to the same destinations, that the rates so found justified or designated by the Commission, in his opinion and from his acquaintance and knowledge of traffic matters, will necessarily result in the entire loss of sugar tonnage to barge lines unless the barge lines reduce their rates to a figure below the rail rates justified or designated by the Commission, and affiant further states that giving consideration to the movement of sugar over the petitioner's line during the years that he has been connected with the company that such reductions will result in a depletion of his company's revenue and to such an extent that will make the continued operation of the Mississippi Valley Barge Line an unprofitable venture.

Affiant further states that insofar as the commission in its decision has attempted to give consideration to alleged cost to shipper of sugar over contract barge lines, that the situation of contract barge line operations in the first half of the year 1933 has entirely changed from that in effect during 1932.

That during 1932 these contract barge operators were [fol. 160] able to secure from private owners certain tow boats and barges for use in the movement of sugar, customarily used in said owners' business, which tow boats and barges have now been withdrawn from use of the contract barge operators, and affiant further states that by reason of this withdrawal and other causes the contract operators handling sugar in 1932 have all ceased operations, with the exception of the American Barge Line, whose rate is 25 cents per 100 pounds, for application on Lots of 450 tons, which rate does not include the terminal expenses of approximately 9 cents to cover cost of loading, unloading, and other expenses necessary to effect delivery. Affiant further states that the service of the American Barge Line is infrequent and that said Company moves a small percentage of the sugar moved by water lines. Affiant further states that since the hearing of the instant docket before the Commission, by far the major portion of sugar moved by water carriers had moved on the rates and via the service of certificated barge lines and at rates substantially higher than the 25 cent rate above mentioned, that the rates designated on the 80,000 pound minimum from New Orleans and related ports by all rail movement to St. Louis is 32 cents, and that the rate authorized by the Commission in its decision and order is lower by five to ten cents than the rates on sugar moved by certificated barge lines, and affiant further states, taking into comparison the rates justified by the Commission for rail movement and the above rates charged by certificated barge lines, will necessarily result in the elimination of movements of sugar by the certificated barge lines and, further, that if any sugar is to move over barge lines, it will be necessary for the barge line to [fol. 161] reduce its rate for this port to port movement lower than the rates justified or designated by the Commission in its decision and order for application for rail movement, and that such a reduction in its rates, giving consideration to the tonnage of sugar that it has moved in the

past, will necessarily result in a material and substantial depletion of its revenue and, in the opinion of affiant, will render the continued operation of the Mississippi Valley Barge Line an unprofitable undertaking.

Affiant further states that the concurring carriers designated in the particular tariffs and supplements above mentioned have, since the presentation of said sugar rates, or approximately at the same time, reduced in substantial amounts the rates of a large majority of the commodities which have been moved by barge lines and by this company, and that the reduction in the rates on said commodities has resulted in substantial reduction of the revenues of your petitioner. Affiant further states that said reductions were made by said carriers for the alleged purpose of meeting water competition and that said reduction in rates were not general in their application.

Affiant further states that the Commission, in its decision, justifies rates from New Orleans and other gulf ports to points in Arkansas and adjacent territory which are higher than rates for points beyond, and, as a specific example, cites that the rates fixed by the Commission from New Orleans to Jonesboro, Arkansas, is 34 cents for 486 miles, and that Jonesboro, Arkansas, is intermediate be- [fols. 162 & 163] tween New Orleans and St. Louis via direct route, and that the rate fixed by the Commission from New Orleans to St. Louis is 32 cents, that no Fourth Section relief is granted to the southern line and that said rates from New Orleans to St. Louis so contrasted with the rates to intermediate points violates the Fourth Section of the Act in that they permit and justify a higher rate for a shorter distance than for a longer distance over the same route.

Affiant further states that the short line rail distance from New Orleans to Des Miones, Iowa, is 1,016 miles, a short line rail distance from New Orleans to Davenport is 919 miles, that, according to the decision of the Commission, the rate from New Orleans to Davenport found justified on 80,000 pounds minimum is 34 cents, while the going rate from New Orleans to Des Moines, Iowa, will be 67 cents, that the Commission, in its decision, recognizes that this results in violation of the Interstate Commerce Act, but attempts to justify said situation by the statement that the rail lines intend to relieve and cure this violation. Affiant further states that, in his opinion, the only way in

which this violation can be cured is by the adjustment of the rates to Des Moines to reduce rates to that point to 34 cents, thus reinstating the former parity of rates with those in effect to Davenport, which will in turn create the same relative maladjustments to points beyond Des Moines.

[fol. 164] PHIL G. SAFFORD, being duly sworn, upon his oath states:

That he is assistant to the president of the Mississippi Valley Barge Line, and for a period of more than twenty years has been connected with railroads and other transportation agencies and in the traffic department.

Affiant further states that in behalf of the Mississippi Valley Barge Line Company he has been charged with the responsibility of matters pertaining to its traffic and the rates to be charged upon same; that he has come in contact with shippers and executives of rail lines with reference to transportation by rail and water.

Affiant further states that he is familiar with various tariffs that have been published and presented to the Commission in connection with various rates and upon particular commodities which have been prescribed for the alleged purpose of meeting water transportation; that the southern lines, who are concurring carriers in Agent Emerson's Tariffs referred to in the petition in the instant case, have since June, 1932, and from time to time proposed certain tariffs which have carried substantial reduction in rates on the following commodities: Bagging, canned goods, coffee, corn, cotton, glassware, paper and paper products, pulp (paper), rice, soap, sugar, sulphur and tobacco. The rates on canned goods, cotton, rice, soap, tobacco, sulphur, corn, glassware, paper and sugar published by the rail carriers since June, 1932, represent reduction in prior rates of from fifteen to forty-five per cent below rates theretofore fixed by the Interstate Commerce Commission as reasonable rates and in various proceedings. The rates so reduced by southern carriers are made solely upon commodities which [fol. 165] move by barge line to and via ports on the Mississippi and Ohio Rivers.

Affiant further states that said southern lines, concurring carriers in Emerson's Tariffs, have not correspond-

ingly reduced rates on other commodities which do not move in connection with the barge line.

Affiant further states that the reduction which the southern lines have been put into effect on the various commodities above specifically mentioned and the reductions allowed by the Commission on sugar in I. & S. Docket 3814 substantially affect the revenues of the Mississippi Valley Barge Line. These commodities constitute sixty per cent (60%) of the volume of the business which the barge line has been able to move. Affiant is not aware of any movement that can compensate the loss of the revenues occasioned by said reductions. Affiant further states that these losses of revenue and tonnage will prevent the continuation of the operations of the Mississippi Valley Barge Line Company as a profitable venture.

L. W. CHILDRESS, being duly sworn, upon his oath states:

That he is now and at all times hereinafter mentioned was President of the Mississippi Valley Barge Line Company, a corporation.

That said corporation was organized under the laws of the State of Delaware and that said company is authorized to engage in and carry on a general transportation business in any and all of its branches, both freight and passenger, and to build, construct, and own various equipments incident and necessary to said operation, and to perform any and all other functions incident and necessary to said business. Your affiant hereto attaches copy of said certificate [fol. 166] of incorporation and by reference thereto makes it a part of this affidavit.

Affiant further states that he promoted and organized said corporation and that in said undertaking he was familiar with and advised of the provisions of Section 500 of the Transportation Act of 1920, and relied upon the mandate of said Act that both rail and water transportation would be preserved in full vigor.

Affiant further states that said corporation has a capital stock of $3,500,000.00 fully paid, and that in its organization no sums were paid for promotions or commissions.

Affiant further states that he was further influenced in promoting said venture by reason of the fact that the Fed-

eral Government had and was appropriating huge sums of money for the purpose of making the Ohio, Mississippi and their tributaries navigable for water-borne tonnage and had provided by enactment for a corporation to be operated by the Federal Government to demonstrate the feasibility and economy of water transportation and specifically designated in said enactment that the demonstration was for the purpose of eventually attracting private capital to undertake and continue said operation.

Affiant further states that pursuant to its charter and after the incorporation, it proceeded and purchased four (4) tow-boats of 2,000 h. p. capacity, fifty (50) barges of 310-ton capacity each and erected or leased terminals at river ports upon and along the Mississippi and Ohio Rivers and that the total investment of said corporation at the present time in said terminals and equipment is approximately in the sum of $3,498,693.11 and that said company began operations on the Ohio and Mississippi Rivers as a [fol. 167] common carrier of freight for hire on or about October 5, 1930, and since said date has been continuing said operations upon regular schedule with dependable service.

Your affiant further states that in conformity with law it applied to the Interstate Commerce Commission prior to the completion of equipment and terminals for a certificate of convenience and necessity in Exparte 99, 167 I. C. C. 41, and that after a public hearing said Interstate Commerce Commission did on or about July 11, 1930, issue a certificate of public convenience and necessity to the Mississippi Valley Barge Line, your petitioner in the instant proceedings; and said Commission specifically found and by order issued stated:

"That the present and future public convenience and necessity require the operation of the Mississippi Valley Barge Line as a common carrier upon the Mississippi and Ohio Rivers between New Orleans and Cincinnati, Ohio, and intermediate points."

And that thereafter, and on the 11th day of March, 1932, by supplemental application, the Commission issued additional authority to the Mississippi Valley Barge Line, by virtue of its order, finding that the present and future public convenience and necessity require the operation of

the Mississippi Valley Barge Line as a common carrier on the Mississippi River between New Orleans and St. Louis and intermediate points.

Affiant hereto attaches copies of said order of the Interstate Commerce Commission.

Affiant further states that he has been in immediate and direct contact with the management and operation of the Mississippi Valley Barge Line since its inception, is familiar with the character of tonnage that it has moved and the particular origins and destinations of said tonnage and has kept exact records of the revenues obtained in the movements of said tonnage.

[fol. 168] Affiant further states that said corporation has now reached the point where the gross earnings slightly exceed the operation and overhead expenses.

Affiant further states that the principal office and executive headquarters of the Mississippi Valley Barge Line are now and at all times mentioned in said petition were situated in the City of St. Louis, State of Missouri, and in the Eastern Division of the Eastern Judicial District of Missouri.

Affiant further states that Agent Emerson's Tariff No. 1-H, I. C. C. No. 156, Supplement No. 54, and his 10-B, I. C. C. 165, Supplement No. 48, proposed reductions in the rates on sugar in carloads from gulf ports, to-wit: Mobile, Ala., New Orleans, La., Pensacola, Fla., and Port Chalmette, La., to certain destinations in Illinois, Indiana, Iowa, Kentucky, Missouri, Ohio, Tennessee, and Wisconsin; and that sugar tonnage of the Mississippi Valley Barge Line in years past has constituted 33⅓% of its total tonnage moving over and along its line and approximately 40% of its total revenues. Affiant further states that the all rail rate from New Orleans to St. Louis, as a typical example, ever since 1922 has been 50 cents per hundred pounds, which in 1932, by virtue of an order of the Commission in Exparte 103, was increased 2 cents per hundred pounds. Affiant further states that the rates proposed by the southern carries in connection with the tariffs above specifically set forth proposed a rate as typical of the rates proposed from New Orleans to St. Louis of 34 cents on 60,000 pounds minimum and 28 cents on 80,000 pounds minimum, which proposed rates include the surcharge of 2 cents per hundred pounds above specifically

designated. Affiant further states that from his experi-
[fol. 169] ence and that of others in connection with transportation that it is necessary in order to attract tonnage that barge rates be made lower, to-wit, differential under the all rail rates from origins to destinations, and that the Interstate Commerce Commission has recognized this principle and in Exparte 96, 99 and 102 has directed and prescribed differentials under the all rail rates of amounts in cents per hundred pounds to be determined by taking 20% of the all rail rate applicable between the two ports served by the barge line in a given movement and thus determined the differential relationship between the barge and the all rail rates.

Affidavit further states that the proposed rates were intended to meet competitive rates and that the Commission in its decision clearly indicates that the purpose of the proposed rate was to meet competitive rates via barge-truck, and affiant further states that the Commission in its decision also clearly indicates that the preponderance of tonnage will be moved on rates found justified for application in connection with the 80,000 pounds minimum.

Affiant further states that the Commission in its decision and order recognizes that the 80,000 pounds minimum rates proposed by the carriers were from five to fifteen cents lower than the cost of the barge-truck movement to Interior points, and that therefore, in approving rates four cents higher than those proposed, has approved and designated for application via rail routes rates from one to eleven cents lower than those applicable via competitive barge-truck service.

Affiant further states that representatives of the company have interviewed shippers of sugar with respect to their continued patronage and those shippers who were [fol. 170] interviewed definitely stated that they will not continue to patronize barge service, except at a substantial differential under the all-rail rates.

Affiant further states that following reports received from its representatives as to the attitude of sugar shippers, he has had compiled figures from the books of the company indicating the loss in net revenue which would have accrued on sugar moved during the period of January 1st, 1931 to July 31st, 1932 if the barge-rail rates suggested by the Commission in their order had been in

effect during that period, that the amount of this loss on the sugar moved via rail-barge routes to the interior during that period would have been approximately $112,000.00.

Affiant further states that the alleged purpose of the proposed reductions was to meet the competition of contract operators on the river. The operators who were furnishing this competition at the time the reductions in rail rates were proposed have, with the exception of the American Barge Line, discontinued operations and the latter company whose service is infrequent, is now charging a rate of 25 cents from New Orleans to St. Louis on minimum lots of 450 tons and this rate does not include the loading and unloading charge and other terminal services which performed by the certificated barge lines at an average cost of 9 cents per hundredweight. Thus the cost of American Barge Line service to the shipper of sugar, New Orleans to St. Louis, would be approximately 34 cents per hundred pounds or 2 cents per hundred pounds higher than the rail rate authorized by the Interstate Commerce Commission. On sugar moved to St. Louis by the American Barge Line, destined to points beyond St. Louis, the rail rate in some cases would be as much as 20 cents per hundred pounds lower than the barge-truck rates. A fur- [fol. 171] ther important factor is that the non-certificated barge lines have no rail barge rates and consequently the sugar they move is not subject to the highly important advantage of transit privileges.

Affiant further states that the major portion of sugar moving by barge over and along the Ohio and Mississippi Rivers moved on a rate of 37 or 42 cents per hundred pounds; that this particular rate is charged by certificated barge lines having received certificates of convenience and necessity from the Interstate Commerce Commission, and that these particular rates, as typical of the character of the competitive rates which the rail lines are attempting to meet, are therefore substantially lower than the rates charged by the certificated barge lines giving regular and dependable service.

Your affiant further states that under his direction there has been computed from the books of the Mississippi Valley Barge Line the particular loss that would have resulted to said corporation in the event that it had moved the same amount of tonnage on the rates suggested for barge application by the Commission in the instant report on its port

to port movement from January 1, 1931, to July 1, 1932, and that the total net loss which would have been sustained by the petitioner in the event it had moved said tonnage on said reduced rates would be approximately $120,000.00.

Your affiant further states that the same concurring carriers designated in Emerson's Tariff, I. C. C. 156 and 165, have proposed and effected drastic reductions in rates upon baggage, canned goods, coffee, corn, cotton, glassware, paper pulp, rice, soap, sugar, sulphur and tobacco either since the effective date of said supplement or approximately [fol. 172] the same date, and that the particular commodities above specifically mentioned, including sugar, constitutes substantially every commodity handled by your petitioner in excess of 1,000 tons per year, and that similar reductions on the same commodities have not been made general by the same carriers and applicable to all territories served by them.

Affiant further states that it is a matter of record and within affiant's knowledge that when water transportation has been eliminated or crippled upon the inland water-ways that rail rates immediately thereafter have been substantially increased in volume.

Affiant further states that in his opinion and from his experience in connection with transportation and traffic matters and affairs that such orders of the Commission, if allowed to stand, will eliminate river transportation upon the Ohio and Mississippi Rivers.

Affiant states that Congress in response to public demand in the Mississippi Valley has appropriated and spent within the past, and has appropriated for future expenditures more than $475,000,000.00 for the purpose of completing navigable channels adequate for reasonable, dependable and regular transportation service and terminal facilities upon and along the rivers of the Ohio. The State of Illinois alone has expended $35,000,000.00 for the improvement of the Illinois River. Municipalities and private capitals have made huge expenditures for terminal and dock facilities for the accom-odation of river-borne traffic. All of these expenditures will be rendered valueless if water transportation is eliminated.

[fols. 173-175] J. R. Van Slyke, being duly sworn, upon his oath states that on, to-wit, the 26th day of July, 1933, he addressed a telegram in exact words, as follows:

"Interstate Commerce Commission, Hon. P. J. Farrell, Chairman, Washington, D. C.:

Mississippi Valley Barge Line will today file a suit to enjoin order of Commission in Sugar Cases I. & S. Thirty-eight Fourteen stop District Judges away from St. Louis therefore impossible to secure interlocutory stay or order before effective dates of rates to-wit July twenty-ninth and thirty first stop Will the Commission therefore kindly change effective date of said rates so we can secure service and arrange for expedited hearing by three judge court stop Our representative leaves tomorrow to interview District Court Judge and hasten this hearing with all possible speed stop Advise by wire collect.

Thompson, Mitchell, Thompson & Young."

That thereafter and on to-wit July 26, 1933, the following telegram was received from the Interstate Commerce Commission:

"Thompson, Mitchell, Thompson & Young:

Your wire twenty sixth Commission concludes it cannot consistently comply with your request.

Farrell, Chairman."

[fols. 176–176b] Affiant further states that on or about July 25, 1933, there was prepared by him a "Motion for Rehearing And Or Reargument And Or Modification On Behalf Of Mississippi Valley Barge Line Company, Protestant in Dockets 3814, 3829 and 3837", which said motion was forwarded to the Commission according to its rules of practice and within due time, and that same was presented to the Commission in connection with its decision and order in I. & S. 3814 and associated cases, and that in said motion and in behalf of the Mississippi Valley Barge Line, protestant in the above entitled dockets, it presented to the Commission changed conditions which had resulted and ob-

tained since the making of the record in those proceedings, and on account of said changed conditions asked the Interstate Commerce Commission to rehear said particular proceedings; that, thereafter, and on, to-wit, August 3, 1933, said motion for rehearing was by the Interstate Commerce Commission overruled. Your affiant hereto attaches a copy of said motion and specifically directs the court's attention to pages 2 and including 18, where specific statement of the allegation of changed conditions is contained in said motion.

[fol. 176c] BEFORE THE INTERSTATE COMMERCE COMMISSION

Investigation and Suspension Docket 3814 and Associated Cases

Sugar from the Gulf and South Atlantic Points—Sugar Cases of 1933

MOTION FOR REHEARING AND/OR REARGUMENT AND/OR MODIFICTION ON BEHALF OF MISSISSIPPI VALLEY BARGE LINE COMPANY, PROTESTANT IN DOCKETS 3814, 3829 AND 3837

Comes now the Mississippi Valley Barge Line Company, protestant in the above designated proceedings, and moves the Commission for a rehearing and/or reargument, and/or modification in the above-entitled dockets, and for grounds for said motion alleges the following:

We apologize for the extent of this presentation. Our excuse is that the threat to protestant's venture is positive and staggering.

[fol. 176d] We courteously request careful consideration of this presentation by the entire Commission.

Protestant will consider first, changed conditions, and, second, the Commission's decision and alleged errors contained therein.

Changed Conditions

Your petitioner as grounds for rehearing, reargument and modification of the decision of the Commission, upon a rehearing would show that since the record in the above-

entitled proceeding was made changed conditions have resulted and now obtain which have rendered stale the record in this proceeding and in particulars upon which the Commission has evidently based its decision, and that these particular changed conditions which this applicant will undertake to show to the Commission in the event a rehearing is granted are as follows:

1. Depression

In 1932, there was in process the most serious business depression this country, and the world at large, has ever known. The low stage has apparently passed. Prices generally have risen within the past two months, a concrete illustration being that of the commodity here involved; [fol. 176e] which in 1932 reached an all time low of $3.62½ per cwt. basis, New Orleans, and is today $4.70 basis, New Orleans. The railroads are handling a much larger volume of business today than in 1932. The cost of materials is on the increase. Under the rail co-ordinator bill the wage schedule of the rail lines has been pegged at a stationary level. We show below a tabulation of figures taken from the issue of the magazine "Business Week," dated July 15, 1933, which clearly illustrates the upturn in business and the increasing price level. We desire to point specifically to the increased carloading from 82,000 cars in the same week in 1932 to 106,000 in 1933, or an increase of 29 per cent. We also desire to point specifically to the average of prices on all commodities which increased from 59.6 to 66.6, or an increase of 12 per cent. As the effect of the National Industrial Recovery Act begins to be felt, this increase will become more rapid:

	Latest week	Year ago	Five-Year average (1928–1932)
The Business Week Weekly Index of Business Activity	*66.6	56.1	.....
Production:			
Steel Ingot Operation (% of capacity)	54	16	46
Building Contracts (F. W. Dodge, daily average in thousands, 4 weeks basis)	$4,040	$4,619	$17,288
Bituminous Coal (daily average, 1,000 tons)	*1,075	678	1,252
Electric Power (millions K. W. H.)	1,539	1,342	1,500

[fol. 176f]

	Latest week	Year ago	Five-Year average (1928–1932)
Trade:			
Total Carloadings (daily average, 1,000 cars)	106	82	144
Miscellaneous and L. C. L. Carloadings (daily average, 1,000 cars)	68	59	95
Check Payments (outside N. Y. City, millions)	$3,301	$3,368	$5,626
Money in Circulation (daily average, millions)	$5,746	$5,785	$4,956
Prices (Average for the Week):			
Wheat (No. 2, hard winter, Kansas City, bu.)	$ .98	$ .45	$ .84
Cotton (middling, New York, lb.)	$ .107	$ .059	$ .139
Iron and Steel (Steel, composite, ton)	$29.67	$29.48	$33.10
Copper (electrolytic, f. o. b. refinery, lb.)	$ .087	$ .051	$ .113
All Commodities (Fisher's Index, 1926=100)	66.6	59.6	82.5

* Preliminary

2. National Industrial Recovery Act

Congress at the request of the President has instructed Mr. Jos. B. Eastman as Co-ordinator of Railroads under the Industrial Recovery Act to plan for exact regulation and co-ordination of all forms of transportation, and the President has heretofore appointed a committee, in which the Cabinet, the railroads and barge line operators are represented, for the purpose of accomplishing a definite result, and this committee is now functioning with this purpose in mind. Regulation and co-ordination of various forms of transportation make unnecessary the drastic cut in rail [fol. 176g] rates here justified, and a decrease in the revenue of the rail carriers of the United States on sugar traffic of $10,000,000 per year, as established by the record in this cause.

As we read this enactment, it is intended to and will apply to essential matters involved in this hearing. The administration has passed this act, which has for its principal aim and purpose re-employment, appreciating the price of commodities and rehabilitation of business. This enactment provides means of controlling unfair competition and will essentially correct the situation applicable to 1932 in the following respects:

(a) The lake and canal lines operating between New York and lake ports have been advised by administrative

authority that they come within this enactment, and they are now drawing up a code to cover their operations. When this is done, it is evident that the rates depicted by the Commission in this decision will be placed upon a definite and fair basis and will not be forced to the rock-bottom charges that were in effect during the year 1932 as a result of rate wars among themselves.

The record in this case is replete with uncertainty as to the base rate from New York to lake ports, and this uncertainty is positive throughout the entire record. The refiners have clearly indicated that the stabilization of the [fol. 176h] rates is of primary importance and that the intrinsic level of the rate is of much less consequence. Therefore, since the lake and canal lines are now making progress to stabilize this rate, then and of necessity any action of the Commission at this time justifying any particular basis of rates upon an incomplete record will result alone in the reduction of the revenues of the rail carriers. Therefore, a showing to this Commission of changed conditions, which at the time of said rehearing we respectfully suggest would positively establish such a stabilization, is ground for a rehearing of the matters presented in these proceedings. The respondents in all of these proceedings have insisted and urged that the rates from New York to the lake ports are the key rates and that the entire adjustment hinges upon these rates. It is certainly evident that if this situation is not given consideration by the Commission, then the lake and canal lines in the prescription of any rate for the future would necessarily be controlled and limited to a differential under the low basis of rates here justified by the Commission. Therefore, the rates authorized in this case, if established, must eliminate all possibility of any beneficial results from a voluntary or forced action on the part of the lake and canal lines in the adoption of their codes. Operators on the river are now working and intend to formulate a code, and what has been said with reference to the East-[fol. 176i] ern situation, therefore, applies with equal force to the rates to be applied upon the river.

(b) Press reports have positively indicated that the sugar refiners have recently allocated the production of raw sugar. This has a very definite and positive bearing upon this situation. Sugar refiners are clearly within the intent and purpose of the Industrial Recovery Act, and, therefore,

will be required either voluntarily or otherwise to adopt a code, which in the future will prevent the sale practices which in the past have forced the refiners to cut their prices and glut the markets. These conditions have forced the refiners to reduce their costs and this they have attempted to accomplish principally in connection with transportation. The converse of this situation is indicated. The allocation of sugar and the stabilization of the price at reasonable figures makes the transportation cost of less significance. The matter of distribution will have been stabilized to the extent that such drastically cut rates which favor certain markets are no longer necessary.

It is positive and certain, so far as this protestant is concerned, that if it is to operate under the rates here found justified, it cannot do so except by a saving in operating expense, and from a careful survey of this situation by the executives of this company it is positive that any substantial reduction in the operating expenses will have to be ef-
[fol. 176j] fected by reducing the compensation of the wage earner employes of this company. This, necessarily, is in direct contradiction of the purpose of the Industrial Recovery Act.

3. Competition

Nineteen hundred thirty-two saw certain contract operators on the river enter into the transportation of sugar. This situation has changed. The Steamer Walter Windsor made its last trip with sugar to St. Louis about nine months ago. The operations financed by Mr. Moog's company have been discontinued, and since May, 1933, this traffic has been moving by common carrier water lines and at a rate of 37 cents per hundred pounds in 500-ton lots. For the information of the Commission, in proof of this statement we quote below a telegram sent by our New Orleans representative to our general freight agent, Mr. Howe, under date of June 6, 1933, with reference to Mr. Moog's traffic:

"Godchaux want load one barge three hundred tons weekly instead five hundred tons every second week thus permitting them keep their assortments in better shape stop Will we protect thirty-seven cents on three hundred ton lots Wire quick."

The Louisiana-Texas Waterways, another former operator on the river, have discontinued, and their last tow boat [fol. 176k] in the upper river service was libelled by the

crew for wages past due. The numerous contract operators mentioned in the testimony in 1932 have all gone with the exception of the American Barge Line, who three months ago advanced their rate to St. Louis from 22 cents, for a purely towing service, to 25 cents, which rate is exclusive of terminal and other incidental costs set forth in the record. This company performed towing service for only two of the refiners to St. Louis, and the service of this barge line is now so infrequent that both of these refiners are now using certificated barge line to handle a large part of their business and at rates considerably higher than the rates of the American Barge Line.

The record indicated that the barges of steel companies were the principal source of supply for the equipment of the contract carriers to effect their tow service. These steel companies, due to the improvement in their business activity, have now withdrawn said barges and tow boats from said service. Barges of similar character are now almost impossible to secure.

4. Regulation

The principal common carriers of water lines have been active in advocating regulation of water transportation by the Commission or some regulatory body and confidently [fol. 1761] expect the passage of such an enactment at the next session of Congress. This fact can be verified, and it, therefore, seems unwise and inopportune on the part of the Commission at this time to embroil all of these competitive carriers in warfare if regulation can and is to be secured and in the immediate future.

5. Clarification of the Record

The cases here involved are principally the result of investigation and suspension dockets. Such procedures allow but a short time from the date of the suspension until the hearing must be held, and as a consequence this protestant was not able to carry on a full and detailed investigation of all of the features which might have a direct bearing on this case. Since the presentation of evidence and briefs it has had an opportunity to investigate some of the features on which testimony of respondent's witnesses seem to be

widely divergent from that of this protestant. It is assumed that the Commission would prefer to have actual facts, a clear record and a clear conception of the interests of all parties in order to make a fair, unbiased and just decision, and we, therefore, bring these features briefly to its attention at this time. This protestant, if given the opportunity, believes that it can show the following situations [fol. 176m] to be at variance with that indicated in the record, and that to the extent that the record has been given recognition in the Commission's findings, those findings would have differed had the situation been clearly shown.

(a) The sole witness for respondents testifying as to contract barge fine operating expenses was witness Moog. The character of this operation has already been dealt with. We have shown in the preceding statement of changed conditions, that this refiner has discontinued its shipments, which, of course, changes the whole complexion of the case in so far as that testimony is concerned. However, we can show to their satisfaction that any depiction of this situation, using as the groundwork the situation as it may apply to that witness' business, would not reflect with any appreciable degree of accuracy the situation of any of the other refiners doing a major business in the same territory. If Mr. Moog will again submit to cross-examination by this protestant, it is advised and believes that it can bring to light differences existent in sales practices at that time which would lend a different aspect to the findings which might be justified on the tonnage as a whole. This protestant also believes that in the same manner it can clear up discrepancies in the variation of terminal costs cited by the two opposing witnesses.

[fol. 176n] (b) We believe that if rehearing is granted it will be possible to develop information as to the manner in which sugar is sold which will bring new light on the costs to the refiners in connection with lake or barge sugar and which will confirm to the Commission's satisfaction that the selling basis of 32 cents at Chicago, for instance, closely corresponds to these actual costs. As near as we can determine from this decision, the Commission has used an average of rates of 22 and 27 cents plus an average of 3 cents and 4 cents terminal, or 28 cents, to arrive at this key water rate.

In this opinion there is mention made of the fact that this service is only available seven months in the year. Evidence submitted showed that this service was used to accumulate a storage stock which was later distributed during the five months when the water route was closed. This storage stock is carried at an expense of at least 3½ cents to 5 cents per month per 100 pounds. The rail rate from New Orleans to Chicago found justified of 34 cents will be in force all the year. Evidence in the record shows that the ocean rail differential routes, New York to Chicago, meet this situation and apply greater differentials when navigation on the lakes is open than when it is closed. It is also to be noted that this rate of 34 cents to meet the situation at Chicago is extended back to Lexington, Ken- [fol. 176o] tucky, so that this place, several hundred miles from the Great Lakes, obtains sugar all the year on rates available at the lake ports only seven months in the year. It is highly improbable that the 34-cent figure all the year compensates the storage, terminal and other accessorial charges that are a matter of record, and for the superior rail service which is testified to by a refiner (last 10 lines, page 6), viz., that rail service was worth 10 cents per 100 pounds more than water service. The 34-cent rate from New Orleans to Chicago will provide for switch delivery at any point in the Chicago switching district and the charge therefor absorbed out of this 34-cent rate. The water rate from New York to Chicago does not include switch delivery. In F. S. A. 14080 (186 I. C. C. 526) this switching, on the water-borne sugar from New York, after reaching the dock at Chicago is shown at 2.25 cents per 100 pounds, but the evidence in these sugar cases shows a charge in excess of this. Unless full weight is given to all the conditions surrounding this key rate, i. e., the water rate from New York to Chicago, a needless sacrifice of revenue badly needed by all of the transportation agencies will follow.

(c) We believe that as to Southern rates, we can prove that the large volume of traffic to Central territory moved from New Orleans solely by virtue of the barge differential route and that had only rail service at properly related [fol. 176p] rates been available, a much smaller tonnage would have originated. We would expect to show that if the avowed purpose of the rail lines to remove barge com-

petition is accomplished, and if properly related rates for all rail are maintained for the future, as they must eventually be, that the movement to this Central territory for the future will be considerably less than has moved barge. We would expect to show that of the four refiners located in the New Orleans district, the one moving the largest tonnage can also reach this territory from its refineries in the East, and that as to Chicago, the key point in the whole adjustment, if the lake canal lines are still able to compete with the rates here found justified, it is reasonable to assume that it will move from the East. As to the other three, we would expect to show that the volume of business done by them in Chicago is inconsequential. All of these points, if included in the record, should indicate the fallacy of an adjustment to interior points forced in an endeavor to secure tonnage to one point on which the rail lines have little, if any, chance of developing much of a movement. Much of the foregoing is vaguely recognized by the Commission in the statement shown on sheet 13 reading as follows:

"The prosperity of respondents depends upon that of the territory they serve and sugar refining is one of the principal industries on their lines in the South. The re- [fol. 176q] finers there depend for their existence largely on their sales beyond the Ohio River and respondents accordingly desire to keep the Northern markets open to them. Incidentally, the barge lines have already done much to that end."

(d) On page 21 of the opinion the Commission find the 60,000-pound minimum rates justified. A basis for rates subject to 80,000 pounds minimum is also fixed. In connection with the 60,000-pound rates the opinion makes no mention of what the barge-rail rates or differentials should be but limit their findings as to 80,000 pounds. It is apparent that the finding is defective in this respect.

Publication of the joint barge-rail rates on sugar for application via the Mississippi Valley Barge Line has been made in the tariffs of the Southern Freight Association by Agent Emerson.

The following wire received from Chairman J. E. Tilford of the Southern Freight Association refuses to publish rates for barge-rail application for account of the Mississippi Valley Barge Line. This wire reads as follows:

"Atlanta, Ga., July 20, 1933.

P. G. Safford, M. V. B. Line, St. Louis:

Sugar rates subject minimum weight sixty thousand pounds from Gulf and South Atlantic Ports approved by [fol. 176r] Commission in I. & S. Docket 3814 are being published effective July twenty ninth Stop Existing rates Emersons Tariff published account barge lines are being continued without change Stop All rail rates subject minimum weight eighty thousand pounds being checked out and will later be published J. E. Tilford."

In view of foregoing and in view of the materially changed circumstances protestant feels that it is entitled to withdraw the recognition of the need for some adjustment in rates conceded in its brief written when totally different circumstances prevailed. It is ready and willing to accept differentials to interior points less than the usual 20 per cent basis would afford if such differentials are fair and reasonable and based on a full and complete record in reference thereto. As to its port to port differentials on all-water movements, it believes that in the procedure under the National Industrial Recovery Act has been provided the means whereby the major lines on the rivers may enter into an agreement to maintain a reasonable differential, and it is agreeable to the proposition that the Commission may act as the adjudicator in a discussion of this question between barge lines and competitive rail lines. We, therefore, propose that inasmuch as the spread between the 60,000-pound rate and the 80,000-pound rates [fol. 176s] authorized is a very narrow one, being only 2 cents on the ports and 5 cents on the interior, and that with a showing indicating such wide disparities between the rates necessary and those authorized for 80,000-pound rates as to also embrace the 60,000-pound rates, that the Commission give reconsideration to the intrinsic levels of such 60,000-pound rates with the view to preserving the revenues of all carriers and eliminating at least portions of the needless reductions authorized in this case. While we are not a protestant in either the Transcontinental or Western Trunk Line Fourth Section cases, since those decisions have obviously been rendered because of the decisions in the cases in which we are a protestant, we respectfully suggest that if the decisions in the cases in which we

are a protestant are further delayed to enable a rehearing to be held that the authorization of that fourth section relief be likewise held in abeyance.

As another changed condition, this protestant calls the attention of the Commission to the fact that since the taking of testimony in this case drastic reductions have been made in the rates on commodities in addition to those which were cited in evidence. If the sugar rates found justified herein are established, a situation will have been created by the rail lines wherein they have reduced very materially the rates on 60 per cent of the total tonnage which in the [fols. 176t-176yy & 177] past has moved by barge line. A list of these commodities is as follows: Bagging, canned goods, coffee, corn, cotton, glassware, paper, pulp, rice, soap, sugar, sulphur, tobacco.

This statement affirms and makes emphatic the statement of protestant. The barge line cannot continue as a profitable venture under rates which the rail lines have been permitted to publish and put in effect, and by the same token efficient rail service cannot be assured by these substantial reductions in the revenue of the railroads.

[fol. 178] J. D. Beeler, first being sworn, states that he is and has been since 1930, Vice President and General Manager of the Mead Johnson Terminal Corporation, incorporated under the laws of the State of Indiana and authorized under its charter to do a business of operating a River-Rail Terminal and Warehouse, its principal function being the transfer of freight from river barges to cars or vice versa. Affiant further states that the Mead Johnson Terminal Corporation was incorporated on June 27, 1930, that it has $561,000.00 in capital stock outstanding fully paid up, and that it has invested in Terminal properties on the river front at Evansville, Indiana the sum of $550,000.00.

Affiant further states that the promotion of this enterprise and the investment in this property was undertaken in reliance on the continued operation of water transportation by barge between the City of Evansville and points on [fol. 179] the Mississippi and Ohio Rivers. Affiant further states that reliance on continued operation of such water service via barge was inspired by faith in effectiveness of

the Enactment of Congress designated as Section 500 of the Transportation Act. Affiant further states that the principal value of this facility aforesaid is for and in connection with traffic which has been water borne, and that if operations of barge lines between Evansville and points on the Mississippi and Ohio Rivers are discontinued, it will have the result of materially decreasing the utility of its facilities. Affiant further states that since the completion of the construction of its facilities under date of January, 1931, approximately 66 per cent of its revenues have been derived from freight traffic which has been water borne to, from or via its terminal aforesaid.

Affiant further states he is familiar with the reductions in the sugar rates proposed by the rail carriers and published by Agent W. P. Emerson, acting under Powers of Attorney from said rail carriers, in his tariffs Nos. 10-B, I. C. C. 165, Supplement 48, and 1-H, I. C. C. 156, Supplement 54, and affiant further states that after said reduced rates were suspended by the Order of the Interstate Commerce Commission under Docket I. & S. 3814, his company applied for and was granted permission to intervene in the proceedings in opposition to the said proposed rates.

Affiant further states that since the completion of construction of its facilities his company has handled a total of 59,997 tons of sugar received from barge lines of which a total of 22,608 tons were stored in transit for varying periods in its warehouse facilities. Affiant further states that the bulk of the sugar so stored in its warehouse facili-[fol. 180] ties was stored in transit under authority of Mississippi Valley Barge Line Company's I. C. C. No. 10, and that the traffic was subsequently moved to points beyond Evansville at through rail-barge rates named in Agent Emerson's tariffs I. C. C. Nos. 156 and 165. Affiant further states that if the privilege of storage in transit on through rates lower than rail rates were to be withdrawn, his company will suffer a very material loss in both tonnage handled and tonnage stored, by reason of such withdrawal.

Affiant further states that in his endeavor to secure business for his facilities in connection with the water service it has been his unvarying experience that unless the cost to the shipper by use of the water route was less than the cost of the comparable transportation service via rail, the shipper would not use the water route. Affiant further states

that the present barge-rail rates applicable on sugar via the Mississippi Valley Barge Line Company in connection with rail lines via Evansville, Indiana, over his facilities, thence rail lines to points beyond, are on a materially higher basis than the rates which the Interstate Commerce Commission has authorized the rail carriers to publish from New Orleans to certain of the same destinations, principally in the states of Illinois, Indiana and Wisconsin.

Affiant further states that in the past the movement of sugars on these barge-rail rates, which in the past have been 10 cents per 100 pounds lower than the all-rail rates, has been principally to destinations to which the all-rail rates are now lower than the barge-rail rates. Affiant has interviewed shippers who have used the barge-rail route via Evansville and has uniformly been advised that unless the rates via barge-rail are reduced to a basis reflecting a substantial differential under the all-rail rates authorized [fol. 181] by the Commission in I. & S. Docket 3814, that no further movements via barge route will be made.

Affiant further states that in pursuance of his investigation with the shippers of sugar he has conferred with the management of the Mississippi Valley Barge Line Company and has been advised that no reduced rates for application via barge-rail service will be made reflecting such differentials under the all-rail rates resulting from the Commission's decision in I. & S. 3814. Affiant further states that since the commencement of the operation of his company, it has lost a considerable volume of tonnage and a considerable amount of revenue by reason of the inability of the said Mississippi Valley Barge Line Company to meet rates of the rail carriers on other traffic which have been reduced for the purpose of eliminating water transportation. Affiant cites as a notable example of such losses, the item of coffee imported via New Orleans, which formerly moved via barge to Evansville, over his company's facilities, thence to destinations on rail lines beyond, at rates lower than the corresponding all-rail rates in effect at that time to the extent of 10¢ per 100 pounds. Affiant states that on September 18, 1932 the rail rates on this traffic were reduced to meet water competition to the extent of 17 cents to Chicago, as an example, and that thereafter the Mississippi Valley Barge Line Company was unable to maintain barge-rail rates differentially under the

rail rates and that as a consequence the movement of this traffic was lost to the route via his company's facility.

Prior to that time, during the period of its operations, the Mead Johnson Terminal Corporation had handled 6,712 tons of this traffic. Affiant states that he has every [fol. 182] reason to believe that in like manner the large volume of sugar which was formerly handled and stored in his company's facilities will be lost to it, and that the resultant loss of revenues, together with losses already sustained, cannot do otherwise than have the effect of rendering its enterprises an unprofitable venture, which must in turn render the value of its facilities of questionable future worth.

Affiant, M. L. COSTLEY, being first duly sworn, states on oath that he is Assistant Traffic Manager of the Illinois Central Railroad Company at New Orleans, Louisiana, that he has been engaged in rate and traffic work with the Illinois Central Railroad Company at New Orleans, Louisiana, for thirty years, that the most southerly terminus of the Illinois Central Railroad Company is at New Orleans, Louisiana, and that the Illinois Central Railroad Company has lines of railroad that extend from New Orleans Louisiana, to ports on the Mississippi, Ohio, and Illinois Rivers, such as Memphis, Tennessee, Evansville, Indiana, Louisville, Kentucky, St. Louis, Missouri, Joliet, Illinois, and Chicago, Illinois.

Affiant states that it is a part of his duty as such Assistant Traffic Manager of the Illinois Central Railroad Company, to keep himself informed and to know the tonnages of the various commodities that are available for shipment from New Orleans, Louisiana to points in the North, including the tonnage in sugar, and that there has been and is exceedingly keen competition between the carriers reaching New Orleans, Louisiana, including not only the rail carriers but the carriers operating barges on the Mississippi River from New Orleans, Louisiana, to points in the North, for [fol. 183] the transportation of sugar from the refineries located in the New Orleans district.

Affiant further states that he testified on October 25, 1932, at the hearing held by the Interstate Commerce Commission at Washington, D. C. in I. & S. Docket No. 3814,

Sugar from Gulf and South Atlantic Points, and that he dealt in his testimony with the competition which the Illinois Central Railroad Company encounters with the operators of contract barges and barges operating under certificates of public convenience and necessity given by the Interstate Commerce Commission for the movement of sugar from New Orleans, Louisiana to points in the North.

Affiant further states that since the date of the hearing in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, he has been continuously located in New Orleans, Louisiana, and has been in constant and close touch with the competition between the rail carriers on the one hand, including the Illinois Central Railroad Company, and the barge lines on the other, for the movement of sugar from New Orleans, Louisiana, as his duties require him to be, that the competition of the contract barge lines has not disappeared, that the competition which was presented by him in his testimony in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, has not changed, and that the situation with respect to the competition of the rail carriers on the one hand, including the Illinois Central Railroad Company, and the barge lines on the other, is the same as it was at the time I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, was heard by the Interstate Commerce Commission.

Affiant further states that the following shipments have been made by contract barges operating from New Orleans, [fol. 184] Louisiana, to points in the North from November 1, 1932 to July 31, 1933, that affiant has included among the contract barges companies a certificated carrier, the American Barge Line Company, for the reason that the American Barge Line Company from affiant's knowledge and experience is more properly classifiable as a contract barge company, performing, as it does to a large extent, mere towage service at rates that are substantially less than the rates charged by other certificated barge companies, such as the Federal Barge Line and the Mississippi Valley Barge Line Company:

Shipments Made by Colonial Sugar Company from Gramercy, Louisiana

Barge line	Destination	Tons
American Barge Line Co.	Evansville, Ind	2,470
" " " "	Cincinnati, Ohio	1,323
" " " "	Louisville, Ky	400
		4193

Shipments Made by C. & H. Sugar Company from New Orleans, Louisiana

Barge line	Destination	Tons	
American Barge Line Co.	St. Louis, Mo	33,889	33,889

Shipments Made by Savannah Sugar Refining Company from New Orleans, Louisiana, ex Savannah, Georgia

Barge line	Destination	Tons	
American Barge Line Co.	Ohio River Points	10,000	10,000

Shipments Made by American Sugar Refining Company from New Orleans, Louisiana

Barge line	Destination	Tons	
Steamer Althea	Mobile, Ala	1,735	
Tenn. Belle	Vicksburg, Miss	164	
" " "	Natchez, "	103	
" " "	Greenville, "	90	
" " "	Monroe, La	769	
" Kurzweg	Morgan City, La	110	
		2,971	2,971
Forwarded		2,971	51,053

[fol. 185]

Barge line	Destination	Tons	
Brought Forward		2,971	51,053
Steamer Kurzweg	New Orleans, La	350	
" Interstate	New Iberia, La	1,164	
Commercial Transfer Co	Monroe, "	238	
Haynes & Boyle Barge	" "	40	
John I. Hay Barge	Calion, Ark	3,951	
" " " "	Camden, "	1,181	
" " " "	St. Louis, Mo	506	
American Barge Line Co.	" " "	3,313	
" " " "	Cincinnati, Ohio	453	
			11,196

Shipments Made by William Henderson from New Orleans, Louisiana

Barge line	Destination	Tons	
John I. Hay Barge	Calion and Camden, Ark	3,860	
La. Texas Waterways Corp.	Calion, Ark	302	
American Barge Line Co.	Louisville, Ky	1,245	
			5,407

Shipments Made by Sterling Sugars Company, from Franklin, Louisiana

Barge line	Destination	Tons	
La. Texas Waterways Corp.	Calion, Ark	450	
" " " "	Huntington, W. Va	1,100	
" " " "	Cincinnati, Ohio	1,850	
" " " "	Louisville, Ky	3,350	
American Barge Line Co.	Portsmouth, Ohio	925	
" " " "	Huntingtln, W. Va	825	
" " " "	St. Louis, Mo	1,000	
" " " "	Lexington, Ky	450	
" " " "	Cincinnati, Ohio	1,440	
" " " "	Louisville, Ky	3,750	
Banner Barge Line	Portsmouth, Ohio	425	
" " "	Huntington, W. Va	425	
			16,190
Forwarded			83,846

[fol. 186]

Brought Forward	83,846

Shipments Made by Godchaux Sugars, Inc., from Reserve, Louisiana

Barge line	Destination	Tons	
Commercial Transfer Co.	Monroe, La.	1,144	
" " "	Ruston, "	63	
John I. Hay Barge	St. Louis, Mo.	1,070	
" " " "	Monroe, La.	94	
" " " "	Pine Bluff, Ark.	71	
" " " "	Camden, "	207	
" " " "	Calion, "	400	
Haynes & Boyle Barge	Monroe, La.	45	
Steamer Tenn. Belle	" "	232	
" " "	Camden, Ark.	80	
" " "	Vicksburg, Miss.	71	
La. Texas Waterways Corp.	St. Louis, Mo.	4,932	
" " " "	Louisville, Ky.	1,328	
" " " "	Evansville, Ind.	478	
American Barge Line Co.	Louisville, Ky.	1,206	
" " "	Evansville, Ind.	478	
Godchaux Sugars, Inc. (Carnegie Barges)	St. Louis, Mo.	2,230	
Banner Barge Line	" " "	1,155	
			15,284
			99,130

Affiant further states that Godchaux Sugars, Inc., made the following shipments of sugar by contract barges from Reserve, Louisiana, in July, 1933:

Barge line	Date	Destination	Pounds
Banner Barge Line	July 22, 1933	St. Louis, Mo.	1,211,000
" " "	" 23 "	" " "	1,107,250
John I. Hay Barge	" 8, "	" " "	462,488
" " " "	" 8, "	" " "	1,678,354

[fol. 187] Affiant further states that the American Sugar Refining Company made the following shipments of sugar by contract barges from New Orleans, Louisiana, in July, 1933:

Barge line	Date	Destination	Pounds
John I. Hay Barge	July 6, 1933	St. Louis, Mo.	142,725
" " " "	" 6, "	" " "	504,650
" " " "	" 6, "	" " "	201,350
" " " "	" 6, "	" " "	60,600
" " " "	" 6, "	" " "	103,425

Affiant further states that the rate paid by the American Sugar Refining Company on shipments of sugar that moved from New Orleans, Louisiana, by contract barges on July 6, 1933, to St. Louis, Missouri, was 20 cents per 100 pounds.

Affiant further states that the American Barge Line Company is transporting sugar to St. Louis, Missouri, at from 20 to 24 cents per 100 pounds.

Affiant further states that shippers of sugar at New Orleans, Louisiana, have been and are today being solicited by contract barge operators for shipments of sugar to St. Louis, Missouri, that the costs of moving sugar from New Orleans, Louisiana, to St. Louis, Missouri, as testified to before the Interstate Commerce Commission at the hearing in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, and the costs at the present time are not different, and that the situation with respect to competition with contract barges and with certificated barges is not different from that which existed at the time of the hearing in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points.

J. L. SHEPPARD, being first duly sworn, states on oath that he is General Freight Agent of the Illinois Central [fol. 188] Railroad Company at Chicago, Illinois, that he has been engaged in rate and traffic work for the Illinois Central Railroad Company for upwards of thirty-seven years and that he has direct supervision and charge of the publication of freight rates that apply on commodities shipped over the lines of railroad of the Illinois Central Railroad Company.

Affiant states that the rates applying on sugar shipped from New Orleans, Louisiana, to various points in the Southwest and the North which took effect on July 29, 1933 and July 31, 1933, which rates were published following the decision of the Interstate Commerce Commission in I. & S. Docket No. 3814, Sugar from Gulf and South Atlantic Points, and I. & S. Docket No. 3837, Sugar from New Orleans to Arkansas, Missouri and Oklahoma, are not in violation of Section 4 of the Interstate Commerce Act, and that departure from Section 4 referred to in Section 17 of the amended petition filed by the Mississippi Valley Barge Line Company against the United States of America and the Interstate Commerce Commission in the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, is protected by Fourth Section Order No. 7542 issued by the

Interstate Commerce Commission, that any departures from Section 4 that may exist in the adjustment of sugar rates from New Orleans, Louisiana, are all protected by the said order of the Interstate Commerce Commission, and that the rates from New Orleans, Louisiana, are not therefore unlawful and void.

Fourth Section Order of the Interstate Commerce Commission, No. 7542

(To be copied by Clerk from said fourth section order as presented to the three-judge court.)

[fol. 189] Order—Filed Aug. 24, 1933

At a General Session of the Interstate Commerce Commission, Held at Its Office in Washington, D. C., on the 2nd Day of November, A. D. 1925

No. 9702

Memphis Southwestern Investigation

Supplemental Fourth Section Order No. 7542

Rates Between Mississippi River Points

It appearing, That by order dated July 1, 1925, the Commission reopened this proceeding for further hearing and investigation in connection with the rates on classes and commodities between St. Louis, Mo., Memphis, Tenn., New Orleans, La. and other Mississippi River Crossings, and points taking the same rates or rates made with relation thereto, via routes operating west of the Mississippi River; and full investigation of the matters and things involved therein having been had, and for good cause shown:

It is ordered, That Fourth Section Order No. 7542 entered in the above entitled proceeding December 2, 1919, as amended from time to time, be, and the same is hereby, further amended as follows:

It is ordered, That carriers parties to the above-numbered *and* applications and other carriers respondents in Memphis-Southwestern Investigation operating routes west of the Mississippi River, according as they participate in the transportation via the following routes:

1. Via the line of the Missouri Pacific Railroad from St. Louis through Poplar Bluff to Paragould; thence via the line of the St. Louis-Southwestern Railway Co. from St. Louis through Brinkley to Fordyce, Arkansas; thence via the line of the Chicago, Rock Island & Pacific Railway Company through El Dorado, Arkansas and Ruston and Winfield, Louisiana to Alexandria, Louisiana; thence via the line of Morgan's Louisiana & Texas Railroad and Steamship Company, via La Fayette, to New Orleans, Louisiana, and their respective connections east of the above described line from St. Louis to New Orleans.

2. Via other routes of the respondents operating exclusively east of the above-described line from St. Louis to New Orleans whose rates are now higher than the rates via the east-side lines between the points hereinafter described—

be, and they are hereby, authorized to establish and maintain between St. Louis, Mo., Memphis, Tenn., Helena, Ark., Vicksburg and Natchez, Miss., and Baton Rouge and New Orleans, La, and points grouped therewith taking the same rates, and between Memphis, Tenn. and Mississippi River Crossings south thereof and points grouped therewith taking the same rates, on the one hand, and points north and east of St. Louis, Mo. and the Mississippi River and on and north of the Ohio River to and from which rates are made with relation to or based on the rates to and from St. Louis, on the other, rates on classes and com- [fol. 190] modities, except fertilizer and grain and grain products, not lower than the present rates between the same points via carriers operating east of the Mississippi River, provided that present rates at the said intermediate points shall not be increased except as authorized by this commission and shall in no instance exceed the lowest combination.

It is further ordered, That except as amended above, or as amended by supplemental fourth section orders entered herein from time to time not in conflict with the relief herein authorized and the said Fourth Section Order 7542, entered December 2, 1919, in the above-entitled proceeding, shall remain in full force and effect.

By the commissioner.

George B. McGinty, Secretary. (Seal.)

[fols. 191 & 192] IN UNITED STATES DISTRICT COURT

ORDER APPROVING STATEMENT OF EVIDENCE

On this 31st day of January, 1934, the foregoing statement of evidence having been lodged with the Court on the 16 day of January, 1934, and the Court being advised that said petitioner (appellant) did, on the 18th day of January, 1934, advise the defendants (appellees of the lodgment of same in this court, did furnish the defendants (appellees) with a true copy thereof on said date, and did advise said defendants (appellees) that it would ask this Court to approve of same on the 31st day of January, 1934, and no objections having been entered to same by said defendants (appellees) or any of them, the same is hereby approved and ordered filed as a "Statement of the Evidence" to be included in the record of appeal in the above styled and numbered cause as provided by rules of court.

(Signed) Charles B. Davis, District Judge.

Approved by:

(Sig.) E. M. Reidy, for U. S. and I. C. C. Elmer A. Smith, for all Interveners.

[fol. 193] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION AS TO PRINTING RECORD—Filed March 5, 1934

To Honorable Charles Elmore Cropley, Clerk:

Pursuant to Paragraph 9, Rule 13, Revised Rules of the Supreme Court of the United States, appellant here submits the following statement of the points upon which it intends to rely in its appeal to the Supreme Court of the United States:

1. That the decision of the Interstate Commerce Commission, its I. & S. Docket 3814, is contrary to law since by exact findings and specific inferences it admits and sanctions:

(a) A violation of Section 500 of the Transportation Act of 1920 (U. S. Code, Title 49, Sec. 142—41 Stat. L. 499);

(b) A violation of the Anti-Trust Laws—(U. S. Code, Title 15, Secs. 1, 2—26 Stat. 209);

(c) A violation of Sections 1, 2, 3 and 4 of the Interstate Commerce Act, (U. S. Code, Title 49, Secs. 1, 2, 3, 4; 24 Stat. 379, 380).

2. That the Interstate Commerce Commission, in failing to grant appellant's Motion, timely filed, for a rehearing of the Commission's I. & S. Docket 3814, was a denial of a right in the appellant.

[fol. 194] 3. That the appellant has a legal interest and right to maintain this suit to annul and set aside the orders of the Interstate Commerce Commission. (District Court Jurisdictional Act, Sec. 41, Par. 28—U. S. Code, Title 28, Sec. 41 (28); 36 Stat. 539.)

4. The matters presented in this suit and appeal are not moot.

5. The Court below and this Court upon appeal has jurisdiction to set aside and annul the orders of the Interstate Commerce Commission brought in issue in this proceeding. (District Court Jurisdictional Act, Sec. 41, Par. 28—U. S. Code, Title 28, Sec. 41 (28); 36 Stat. 539.)

6. The orders of the Interstate Commerce Commission here complained of violate the declared policy of Congress.

7. That the final decree of the three-judge court dismissing appellant's appeal was erroneous and contrary to law.

The appellant here indicates the parts of the record which it thinks necessary for the consideration of the particular matters presented above:

(a) Statement of Basis of Appellate Jurisdiction, Folio pages 1, 2, 3.

(b) Citation, Folio pages 5, 6.

(c) Amended Petition, Folio page 8 to and including page 32.

(d) Exhibit B, Decision of the Interstate Commerce Commission, Folio page 34 to and including page 63.

[fol. 195] (e) Original Order of the Commission dated July 3, 1932, Folio pages 64 and 65.

(f) Amended Order of the Commission under date of July 18, 1933, Folio page 66.

(g) Answer of the United States of America to petition and amended petition, Folio page 67 to and including page 73.

(h) Answer of Interstate Commerce Commission to amended petition, Folio page 74 to and including page 85.

(i) Intervening Petition of Illinois Central Railroad Company, et al., Folio page 86.

(j) Answer of Interveners, Illinois Central Railroad Company, et al., Folio page 87 to and including page 100.

(k) Appellant's Supplemental Petition, Folio pages 101 and 102.

(l) Decision of Honorable John B. Sanborn, Circuit Judge, Honorable Charles B. Davis, District Judge, and Honorable Charles B. Faris, District Judge, Folio page 103 to and including page 108.

(m) The Findings of Fact and Conclusions of Law as given by the three-judge court, Folio page 109 to and including page 116.

(n) Final Decree of said three-judge court, Folio page 117.

(o) Appellant's Petition for Appeal, Folio pages 118 and 119.

(p) Appellant's Assignment of Errors, Folio page 120 to and including page 131.

[fol. 196] (q) Order of Court Allowing Appeal, Folio pages 132, 133.

(r) Appellant's Bond on Appeal approved by Judge of the United States District Court, Folio pages 134, 135.

(s) Præcipe on Appeal, Folio page 136 to and including page 138.

(t) Certificate of District Judge as to question of finding of fact and declaration of law in behalf of appellant, Folio page 139.

(u) Appellant's Requested Finding of Fact, Folio page 140 to and including page 149.

(v) Appellant's Requested Declaration of Law, Folio page 150 to and including page 153.

(w) Appellant's Statement of Evidence, To Be Incorporated In The Record, Folio page 154 to last paragraph on page 162; then from Folio page 164 to and including portion of page 173 ending with the words "Farrell, Chairman"; then beginning on Folio page 176 with the words "Affiant further states", down to the concluding portion of

the same paragraph on the same page ending with the words "Allegation of changed condition is contained in said motion"; then the portion of the printed Motion for Rehearing and/or Reargument attached to Folio page 177 of the transcript, to-wit, from page 1 to and including that portion of the printed page 18 ending with the words "the revenue of the railroads" down to heading "The Commission's decision and alleged errors contained therein." Also Folio page 178 to and including Folio page 191.

Respectfully submitted, Truman P. Young, Counsel for the Appellant.

[fol. 197] [File endorsement omitted.]

Endorsed on cover: File No. 38,410. E. Missouri, D. C. U. S. Term No. 807. Mississippi Valley Barge Line Company, Appellant, vs. The United States of America, Interstate Commerce Commission, Illinois Central Railroad Company et al. Filed February 23, 1934. File No. 807, O. T., 1933.

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Statute Cited.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 807

MISSISSIPPI VALLEY BARGE LINE COMPANY,
APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ILLINOIS CENTRAL RAILROAD COMPANY, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ILLINOIS.

STATEMENT OF BASIS OF APPELLATE JURISDICTION.

Pursuant to Supreme Court Rule 12, Paragraph 1, the above petitioner (appellant) files this, its statement, showing the basis on which said petitioner (appellant) contends that the Supreme Court of the United States has appellate jurisdiction to review on appeal the decree appealed from herein, as follows:

I.

The statute believed to sustain the appellate jurisdiction is the Act of October 22, 1913, Chapter 32, 38 Statute

220 (now Section 47 a, Title 28, United States Code), which provides that an appeal from a final decree of a three judge Court (in suits brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission) may be reviewed by the Supreme Court of the United States, if appeal to the Supreme Court be taken by the aggrieved party within sixty days after the entry of the final judgment or decree, such appeals to be taken in like manner as appeals are taken under existing law or in equity cases.

II.

The decree appealed from was entered on the 21st day of November, 1933.

III.

The application for an appeal was presented on the 16th day of January, 1934.

IV.

The appeal herein is from a final decree of a three-judge Court in a suit in equity to set aside, annul and suspend an order of the Interstate Commerce Commission, its docket I. & S. 3814. In said suit the Mississippi Valley Barge Line Company, a corporation, was plaintiff, The United States of America and the Interstate Commerce Commission were defendants, and Illinois Central Railroad Company, Louisville and Nashville Railroad Company, Southern Railway Company, Cincinnati, New Orleans and Texas Pacific Railway Company, The Alabama Great Southern Railroad Company, and New Orleans and Northeastern Railroad Company were interveners. The three-judge Court entered a final decree therein on November 21, 1933, dismissing the plaintiff's petition, and thereafter petitioner took an appeal to the Supreme Court of the United

States which was duly allowed on the 16th day of January, 1934.

V.

The following cases are believed to sustain the jurisdiction of the Supreme Court:

Chicago Junction Cases, 264 U. S. 258;

Alton Railroad Company v. *United States*, 287 U. S. 229;

Intermountain Rate Case, 234 U. S. 476;

United States v. *New River Co.*, 265 U. S. 533.

WHEREFORE, your petitioner respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal.

Respectfully submitted,

(Signed) TRUMAN P. YOUNG,

(Signed) J. R. VAN SLYKE,

Counsel for Petitioner.